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No. ____

IN THE

Supreme Court of the United States

BOOKER T. HUDSON,

Petitioner,

—v.—

MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the inevitable discovery doctrine create a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, the Arkansas Supreme Court, and the Maryland Court of Appeals have held?

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Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (4th ed. 2004).....8

REFERENCE TO OPINIONS BELOW

The June 17, 2004, opinion and the May 1, 2001, order of the Michigan Court of Appeals are unpublished. The January 31, 2005, order of the Michigan Supreme Court is published as *People v. Hudson*, 692 N.W.2d 385 (Mich. 2005), and the December 18, 2001, order of the Michigan Supreme Court is published as *People v. Hudson*, 639 N.W.2d 215 (Mich. 2001). All of these opinions and orders are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the June 17, 2004, opinion of the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal from that decision on January 31, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On August 27, 1998, several Detroit police officers executed a search warrant on the home of Petitioner Booker T. Hudson. As a result of the search, Petitioner was charged with possession of cocaine and felony firearm.

On April 15, 1999, Petitioner filed a motion in the trial court to suppress the evidence seized from his home. The motion alleged that the evidence had been "obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution," and that the search also violated the state constitution and a state statute requiring police officers to "knock and announce" their presence before serving a search warrant.

At an evidentiary hearing on Petitioner's suppression motion, the prosecution presented a single witness, Officer Jamal Good. Officer Good testified that he did not see any activity inside Petitioner's house as he and the other officer approached to execute the search warrant, nor did he hear any noises coming from inside. App. 8. Officer Good testified that he did not knock before entering Petitioner's home and he did not see any other officers knock. App. 7, 9. Officer Good did announce his presence but waited only three to five seconds before forcibly entering Petitioner's home because that's "how long it took me to go in the door." App. 8.

Given Officer Good's testimony, the prosecutor conceded at the evidentiary hearing that the police violated the "knock and announce" requirement by waiting only three to five seconds before entering the home. App. 9 -10. The trial judge granted Petitioner's motion to suppress the evidence. App. 10.

The prosecution filed an interlocutory appeal of the trial judge's suppression order to the Michigan Court of Appeals. In

its brief, the prosecution argued that the trial court erred in suppressing the evidence because the Michigan Supreme Court had held in *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999), and *People v. Vasquez*, 602 N.W.2d 376 (Mich. 1999), that the inevitable discovery doctrine of *Nix v. Williams*, 467 U.S. 431 (1984), creates a *per se* exception to the exclusionary rule for Fourth Amendment "knock and announce" violations.

In response to the prosecutor's appeal, Petitioner filed a brief in the Michigan Court of Appeals on April 3, 2001, in which he argued at length that *Stevens* and *Vasquez* were wrongly decided, were contrary to the Fourth Amendment, and amounted to misapplications of this Court's decisions in *Williams* and *Wilson v. Arkansas*, 514 U.S. 927 (1995). Defendant-Appellee's Brief on Appeal at 5-15. Petitioner concluded by urging that "[t]he decision of the trial court suppressing the evidence obtained in violation of the Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment to the United States Constitution, should be affirmed." *Id.* at 15.

The Michigan Court of Appeals, however, reversed the suppression order on May 1, 2001. App. 4. In its order, the appellate court observed that it was bound by the Michigan Supreme Court's decisions in *Stevens* and *Vasquez* to hold that "suppression of evidence is not the appropriate remedy when such a violation has occurred." App. 4. [1]

On May 21, 2001, Petitioner filed a timely application for leave to appeal to the Michigan Supreme Court in which he again argued that *Stevens* and *Vasquez* were contrary to the

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[1] Even though Petitioner had argued for suppression under the Fourth Amendment in both the trial court and on appeal, the Michigan Court of Appeals' order reversing the trial court's suppression order does not mention the Fourth Amendment and instead refers only to the state statute requiring the police to knock and announce.

Fourth Amendment and the decisions of this Court. In the brief in support of that application, Petitioner reproduced his Fourth Amendment argument from his Michigan Court of Appeals brief essentially verbatim.

The Michigan Supreme Court denied Petitioner's application by a vote of five to two. App. 5. In its order denying Petitioner's application, the majority observed:

> Although this Court is aware of the decision of the Sixth Circuit Court of Appeals in *United States v. Dice*, [200 F.3d 978, 986 (6th Cir. 2000)], holding that suppression of the evidence is the constitutionally mandated remedy for a violation of the Fourth Amendment "knock and announce" requirement, this Court reaffirms its decision in [*Stevens* and *Vasquez*]. In those cases, this Court held that suppression of the evidence is not the appropriate remedy for a violation of the "knock and announce" requirement under either the Fourth Amendment or [the state constitution]."

App. 5.

Petitioner's case then returned to the trial court. After a bench trial on October 25, 2003, he was convicted of possession of less than 25 grams of cocaine, and acquitted of the felony firearm charge. He was sentenced to 18 months probation.

Following his conviction, Petitioner filed a timely appeal to the Michigan Court of Appeals, and he again argued in his brief that the Fourth Amendment required the suppression of the evidence seized from his home after the "knock and announce" violation. Defendant-Appellant's Brief on Appeal at 6-12. Petitioner summarized his argument by stating:

> The United States Supreme Court has never utilized the "inevitable discovery" doctrine as the Michigan Supreme Court did in *Stevens* and *Vasquez* to purge the unlawful actions of the police officers who actually violated the Fourth Amendment. The evidence obtained in the case at bar was seized by the police in violation of the Fourth Amendment to the United States Constitution and should be suppressed.

Defendant-Appellant's Brief on Appeal at 12.

On June 17, 2004, the Michigan Court of Appeals affirmed Petitioner's conviction. In an unpublished opinion, the court observed that "regardless of the correctness of the decisions in *Vasquez* and *Stevens*, those decisions are binding on this court." App. 1-2.[2]

On August 11, 2004, Petitioner filed a timely application for leave to appeal the affirmance of his conviction to the Michigan Supreme Court. In his application, Petitioner again reproduced essentially verbatim the Fourth Amendment argument from his brief to the Michigan Court of Appeals.

On January 31, 2005, the Michigan Supreme Court denied Petitioner's application. App. 3. One justice would have granted the application in order to reconsider *Stevens*.

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[2] The Michigan Court of Appeals' opinion in 2004, like its opinion in 2001, *see* n. 1, *infra*, mentions only the state's "knock and announce" statute even though Petitioner had primarily raised a Fourth Amendment argument for suppression.

REASONS FOR GRANTING THE WRIT

I. At Least Three Circuits and Three State Courts of Last Resort Have Divided on Whether the Inevitable Discovery Doctrine Creates a *Per Se* Exception to the Exclusionary Rule for Evidence Seized After a Fourth Amendment "Knock and Announce" Violation.

This case squarely presents a Fourth Amendment issue that this Court declined to decide in *Wilson v. Arkansas*, 514 U.S. 927 (1995):

> Respondent and its *amici* also ask us to affirm the denial of petitioner's suppression motion on an alternative ground: that exclusion is not a constitutionally compelled remedy where the unreasonableness of a search stems from the failure of announcement. Analogizing to the "independent source" doctrine applied in *Segura v. United States*, 468 U.S. 796, 805, 813-816 (1984), and the "inevitable discovery" rule adopted in *Nix v. Williams*, 467 U.S. 431, 440-448 (1984), respondent and its *amici* argue that any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation. Because this remedial issue was not addressed by the court below and is not within the narrow question on which we granted certiorari, we decline to address these arguments.

Wilson, 514 U.S. at 937 n.4.

The issue that *Wilson* left open has divided the federal circuits and state courts of last resort. The Seventh Circuit and the Michigan Supreme Court have held the inevitable discovery doctrine creates a *per se* exception to the exclusionary rule for evidence found after a "knock and announce" violation because the police presumably would have found the same evidence if they had knocked and announced. *United States v. Langford*, 314 F.3d 892, 894-95 (7th Cir. 2002), *cert. den.*, 540 U.S. 1075 (2003); *People v. Stevens*, 597 N.W.2d 53, 59-62 (Mich. 1999), *cert. den.*, 528 U.S. 1164 (2000); *People v. Vasquez*, 602 N.W.2d 376, 378-79 (Mich. 1999). By contrast, the Sixth and Eighth Circuits and the courts of last resort in Arkansas and Maryland have squarely rejected claims that the inevitable discovery doctrine should insulate "knock and announce" violations from the exclusionary rule. *United States v. Dice*, 200 F.3d 978, 984-85 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1220 (8th Cir. 1994); *Mazepink v. State*, 987 S.W.2d 648, 657 (Ark.), *cert. den.* 528 U.S. 927 (1999); *State v. Lee*, 821 A.2d 922, 931-946 (Md. 2003).

There is, therefore, a split of authority justifying the exercise of this Court's jurisdiction. Indeed, Petitioner's case illustrates the severity of the split. The Michigan Court of Appeals was bound by the Michigan Supreme Court's decisions in *Stevens* and *Vasquez* to admit the evidence found in Petitioner's home despite the prosecution's concession that the police had violated the "knock and announce" requirement. Had Petitioner been charged in federal court in Detroit instead of in a Michigan state court, the district would have been bound by the Sixth Circuit's decision in *Dice* to suppress the very same evidence. Since criminal defendants cannot raise Fourth Amendment issues on federal habeas corpus, *see Stone v. Powell*, 428 U.S. 465 (1976), only a grant of *certiorari* can

resolve the split between the Michigan Supreme Court and the Sixth Circuit.

Certiorari is also appropriate because the decisions in *Stevens*, *Vasquez*, and *Langford* represent a fundamental misunderstanding of the inevitable discovery doctrine announced in *Nix v. Williams*, 467 U.S. 431 (1984). That version of the inevitable discovery doctrine would eviscerate not only the "knock and announce" rule but many other Fourth Amendment doctrines as well.

The Seventh Circuit explained its version of the inevitable discovery doctrine in *Langford*: "The fruits of an unlawful search are not excludable if it is clear that the police would have discovered those fruits had they obeyed the law." 314 F.3d at 895. As Professor LaFave has characterized this argument, "if we hadn't done it wrong, we would have done it right." 6 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 11.4(a) at 272 (4th ed. 2004). *See also id.* at 273 (characterizing *Stevens* as adopting "Alice-in-Wonderland version of inevitable discovery").

By contrast, the Sixth Circuit recognized in *Dice* that the inevitable discovery doctrine properly applies only when the evidence would have inevitably been found by means of an *independent* and *untainted* investigation. 200 F.3d at 986. Thus, the inevitable discovery doctrine does not apply when the very same officers who have violated the Fourth Amendment "knock and announce" requirement simply barge into a home and discover the evidence. *Id.*

The version of inevitable discovery followed by the Seventh Circuit and the Michigan Supreme Court would destroy any incentive the police may have to comply with the "knock and announce" requirement:

> To remove the exclusionary bar from this type of knock-and-announce violation whenever officers possess a valid warrant would in one swift move gut the constitution's regulation of *how* officers execute such warrants. As the *Marts* court observed, the knock-and-announce rule "would be meaningless since an officer could obviate illegal entry in every instance simply by looking to the information used to obtain the warrant. [O]fficers, in executing a valid search warrant, could break in doors of private homes without sanction."

Dice, 200 F.3d at 986 (quoting *Marts*, 986 F.2d at 1220).

Indeed, the same "inevitable discovery" argument accepted in *Langford* could potentially be used to deny suppression of evidence even when the police proceed without a warrant at all. In such cases, the police would only have to show that they could have obtained a warrant and that they would have found the same evidence if they had bothered to do so. If such an argument were accepted, the incentive for the police to obtain a warrant would vanish, just as *Langford*, *Stevens*, and *Vasquez* destroy any incentive the police may have to "knock and announce" before executing a warrant. Therefore, this Court should grant *certiorari* not only to clear up the split of authority on the application of the inevitable discovery doctrine to "knock and announce" violations, but also to clarify the inevitable discovery doctrine itself.

Finally, Petitioner's case is an excellent vehicle to address these issues. There is no dispute that a "knock and announce" violation occurred; indeed, the prosecutor *conceded* the violation at the suppression hearing, and the trial court accordingly ordered the evidence suppressed. App. 9-10.

Given the prosecutor's concession that a "knock and announce" violation occurred, the only Fourth Amendment issue left to be litigated in the state appellate courts was whether *Stevens* and *Vasquez* were correct to hold that the inevitable discovery doctrine creates an exception to the exclusionary rule for all "knock and announce" violations. The issue was squarely presented to the Michigan Court of Appeals and the Michigan Supreme Court in both the prosecution's interlocutory appeal and in Petitioner's direct appeal following his conviction, and the Michigan Supreme Court acknowledged the conflict between its decisions in *Stevens* and *Vasquez* and the Sixth Circuit's decision in *Dice*. App. 3.

In short, this case cleanly presents an important Fourth Amendment issue that has split the federal circuits and state courts of last resort. Review by this Court is therefore appropriate.

CONCLUSION

Therefore, Petitioner Booker T. Hudson respectfully requests that this Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: March 31, 2005

APPENDIX

APPENDIX

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Booker T. HUDSON, Jr., Defendant-Appellant.

No. 246403.
June 17, 2004.

Before NEFF, P.J., and ZAHRA and MURRAY, JJ.

MEMORANDUM.

Defendant was charged with possession of less than fifty grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, he was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and sentenced to eighteen months' probation. Defendant appeals his conviction as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that the evidence, which was seized during the execution of a search warrant, should have been suppressed because the police violated the knock and announce statute, MCL 780.656.

Although the trial court agreed with defendant's argument and initially dismissed the charges, this Court reversed and remanded, ruling that suppression was not an appropriate remedy as stated in *People v. Vasquez (After Remand)*, 461 Mich. 235; 602 NW2d 376 (1999), and *People v. Stevens (After Remand)*, 460 Mich. 626; 597 NW2d 53 (1999). *People v.*

Hudson, unpublished order of the Court of Appeals, entered May 1, 2001 (Docket No. 230594). Our Supreme Court denied leave to appeal. *People v. Hudson*, 465 Mich. 932; 639 NW2d 255 (2001). Because there has not been any change in the law or the relevant facts, this Court cannot, pursuant to the law of the case doctrine, decide the issue any differently on this appeal. *Grace v. Grace*, 253 Mich. App. 357, 362-363; 655 NW2d 595 (2002). Moreover, regardless of the correctness of the decisions in *Vasquez* and *Stevens*, those decisions are binding on this Court. *People v. Beasley*, 239 Mich. App. 548, 559; 609 NW2d 581 (2000).

Affirmed.

Supreme Court of Michigan

People
v.
Booker T. Hudson, Jr.

NO. 126791. COA No. 246403.
January 31, 2005

On order of the Court, the application for leave to appeal the June 17, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., would grant leave to appeal to reconsider *People v. Stevens,* 460 Mich. 626, 597 N.W.2d 53 (1999).

Court of Appeals, State of Michigan

People of MI v Booker Hudson

Docket No. 230594, LC No. 98-010141
May 1, 2001

ORDER

Kelly, Presiding Judge, Talbot and Collins, Judges

The Court orders that the motion for peremptory reversal under MCR 7.211(C)(4) is GRANTED because the trial court clearly erred in granting defendant's motion to suppress based on the officers' violation of the "knock and announce" statute, MCL 780.656; MSA 28.1259(6). In *People v. Stevens*, 460 Mich 627; 597 NW2d 53 (1999) and *People v. Vasquez*, 461 Mich 235; 602 NW2d 376 (1999), a majority of our Supreme Court unequivocally held that suppression of evidence is not the appropriate remedy when such a violation has occurred.

It appears that the trial court believed that the *Stevens* and *Vasquez* decisions were improperly decided. Regardless of this belief, it is a fundamental and basic tenet of our jurisprudence that a decision of the majority of justices of the Michigan Supreme Court is binding on this Court and the trial courts. *People v. Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). The trial court disregarded its obligations to follow and be faithful to the law as required by stare decisis. Were all trial courts to engage in such unacceptable conduct as displayed by this trial court, the result would be judicial chaos.

The October 10, 2000, order of the Wayne Circuit Court is REVERSED and the cause is REMANDED for further proceedings. The Court does not retain jurisdiction.

Supreme Court of Michigan

People
v.
Booker T. Hudson

NO. 119294. COA No. 230594.
December 18, 2001

On order of the Court, the application for leave to appeal from the May 1, 2001 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. Although this Court is aware of the decision of the Sixth Circuit Court of Appeals in *United States v Dice*, 200 F 3d 978, 986 (CA 6 2000), holding that suppression of the evidence is the constitutionally mandated remedy for a violation of the Fourth Amendment "knock and announce" requirement, this Court reaffirms its decision in *People v. Stevens (After Remand)*, 460 Mich 626 (1999) and *People v. Vasquez (After Remand)*, 461 Mich 235 (1999). In those cases, this Court held that suppression of the evidence is not the appropriate remedy for a violation of the "knock and announce" requirement under either the Fourth Amendment or Const. 1963, art. 1, § 11. *Stevens,* supra at 635, 643; *Vasquez,* supra at 242.

Cavanagh and Kelly, JJ., would grant leave to appeal.

THIRD CIRCUIT COURT CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN

vs. Case No. 98-10141

BOOKER T. HUDSON, JR.,

EVIDENTIARY HEARING

BEFORE THE HON. DEBORAH A. THOMAS, JUDGE

Tuesday, October 10, 2000, Detroit, Michigan

* * * *

[p. 10]

JAMAL GOOD

DIRECT EXAMINATION

BY MR. McCREEDY [Prosecutor]:

Q: Please tell us your name?

A: Jamal Good.

Q: Your occupation?

A: Detroit Police Officer.

Q: On August 27, 1998, were you employed as a Detroit Police Officer?

A: Yes, I was.

* * * *

[p. 12]

Q: And tell us exactly what you do as you approach this house?

A: I go up to the house. I announce our presence and purpose and make entry into the dwelling.

Q: How do you go about announcing your presence and purpose?

A: I shout out, police, search warrant.

Q: Do you hear anybody else yelling anything as you are going up to the house?

A: I recall other officers saying it, yes.

Q: Other officers were saying that also?

A: Yes.

Q: Once you're up to the door, do you stop or do you go right in?

A: I went right in.

Q: Does anybody knock before going in?

A: I don't recall anyone knocking. I didn't knock, no.

Q: And who was the first person in, if you recall?

A: I was.

[p. 13]

Q: And how much time elapsed between the first time you yelled or anybody that you heard yelled, police, search warant, until the time that you went through that door; how much time elapsed?

A: Maybe five seconds. Three to five seconds, something like that.

* * * *

Q: What was your reason on this day for waiting five seconds or approximately five seconds?

A: About how long it took me to go in the door.

Q: And did others follow behind you?

A: Yes, sir.

Q: Once you got up to the door, were you able to see anything inside before you went in?

A: No, not that I can recall, no.

Q: And how about were you able to hear anything prior to going in?

A: I don't recall hearing anything at all.

[p. 14]

CROSS-EXAMINATION

BY MR. KORN [Defense counsel]:

* * * *

Q: And you didn't see anybody knock on that door, did you?

A: No.

Q: Okay. You yourself didn't knock on the door, did you?

A: No.

[p. 15]

Q: And after you announced your purpose and presence, you went through the door; is that correct?

A: That's correct?

Q: And you said that was in three to five seconds; is that correct?

A: Yes.

Q: So you definitely did not wait to see if anybody would answer the door; is that correct?

A: No, I didn't.

* * * *

[p. 16]

ARGUMENT BY MR. McCREEDY: Well, your Honor as I understand the Knock and Announce statue [sic], knocking is not actually required, just announcing presence and purpose. However, the case law does indicate that the [p. 17] police are supposed to wait until a person who is at the farthest point in the house has an opportunity to answer the door, and the officer admitted that that's not the case here. And between three and five seconds, that's not the case in even the smallest house.

This was a narcotic raid and I wish the law were as it should be that in narcotics, it's different from any other kind of

search warrant raid because there is the possibility of getting shot, possibility of destruction of evidence, that is not the law and I guess I have to concede at this point that technically did violate the search – or the knock and announce statue [sic].

* * * *

[p. 20]

COURT'S RULING

THE COURT: It's a dangerous job and the risks that are involved and it's a balance. It's hard to keep the balance, especially day in and day out. Sometimes the balance works; sometimes the balance doesn't. You just keep trying.

In this particular circumstances, it didn't balance. It still remains a dangerous job. Part of the dangerous job is trying to keep that balance. Motion granted.

(2)

NO. 04-1360

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
October Term, 2004

BOOKER T. HUDSON, JR.,
Petitioner,

vs

STATE OF MICHIGAN
Respondent.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

ANSWER OF RESPONDENT

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COUNTERSTATEMENT OF THE QUESTION

I.

Exclusion of evidence is only appropriate when to fail to exclude would put the police in a better position than they would have been had the constitutional error never occurred. There is no element of causality between a knock-and-announce violation and the seizure of contraband pursuant to a valid search warrant and a search of proper scope. Does the Fourth Amendment require the exclusion of evidence because of a violation of principles of announcement despite a lack of causal connection between any police error and the discovery of the contraband?

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Statement of Material Facts And Proceedings

Respondent accepts Petitioner's statement for purposes of this response only.

Argument

I.

Exclusion of evidence is only appropriate when to fail to exclude would put the police in a better position than they would have been had the constitutional error never occurred. There is no element of causality between a knock-and-announce violation and the seizure of contraband pursuant to a valid search warrant and a search of proper scope. The Fourth Amendment does not require the exclusion of evidence because of a violation of principles of announcement despite a lack of causal connection between any police error and the discovery of the contraband.

The State cannot contest that the petition here presents a question of importance to the jurisprudence of the Nation, involving a split both in federal circuits and state supreme courts. But Michigan and the seventh circuit, respondent submits, have resolved the question correctly.

The Michigan Supreme Court has held, in the opinion followed by the Michigan Court of Appeals in the present case, that evidence obtained as a result of a search of proper scope pursuant to a valid warrant is not the fruit–there is no causal connection–of a knock and announce defect under the Constitution. *People v. Stevens*, 460 Mich. 626, 631, cert den 528 U.S. 1164, 120 S Ct 1181, 145 L.Ed.2d 1088 (2000). The Arkansas Supreme Court reached the opposite conclusion in *Marzepink v State*, 987 SW2d 648 (1999). And see also *State v. Lee*, 374 Md. 275, 821 A.2d 922 (Md.,2003). State Supreme Courts are thus in disagreement on a question of moment. The Sixth Circuit has also reached a conclusion opposite to the Michigan Supreme Court. See *United States*

v Dice. 200 F 3d 978 (CA 6, 2000), the panel rejecting independent source and inevitable discovery arguments offered by the Government, and failing completely to discuss the absence of causality between the constitutional error and the discovery of the evidence. But the 7th Circuit has reached the same conclusion as the Michigan Supreme Court. See *United States v. Espinoza*, 256 F.3d 718, 726 (CA 7, 2001); *United States v. Langford*, 314 F.3d 892, 894 (CA 7 (Ind.), 2002); *United States v. Jones*, 149 F.3d 715, 716-17 (CA 7, 1998). And it has been said by at least one court that "The Supreme Court has not yet settled whether and to what extent the exclusionary rule applies to knock and announce violations. *See Wilson*, 514 U.S. at 937 n. 4, 115 S.Ct. 1914 (declining to address arguments 'that any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation'"). *Artis v. United States*, 802 A.2d 959, 969 (D.C.,2002). Respondent submits that it is the Michigan Supreme Court and the 7th circuit which resolve the issue correctly.

In *Wilson* v *Arkansas*, 514 US 927, 115 S Ct 1914, 131 L Ed 2d 976 (1995) this Court held that "knock-and-announce" principles are a part of the "reasonableness" required by the Fourth Amendment in the search of a dwelling. The Court, however, did not have occasion to reach the question of whether an exclusionary sanction should apply to a violation, as the State of Arkansas had not determined whether a violation had occurred, the Arkansas Supreme Court having taking the position that no Fourth Amendment question was involved. The State submits that the Michigan Supreme Court has answered this question correctly in *Stevens*, supra.

Assume several examples: 1)the police enter a home and search it with no warrant at all, and no exigent circumstances or any other independent justification; 2)the

police enter a home and search with a search warrant in areas within the home where the items sought could not possibly be found, finding other seizable items instead, and 3)the police enter a home and search it pursuant to a search warrant, finding the items sought in a search of proper scope and intensity, but after having failed to wait after knocking on the door and announcing their presence and purpose for a reasonable time (or having failed to knock and announce at all under conditions that do not excuse the failure). In the first two situations the invasion of privacy simply *should not have occurred at all*. In the first, the entry into the dwelling *should never have occurred*; in the second, the search of certain places within the dwelling should *never have occurred*. The evidence found in each is causally connected to the constitutional error, and exclusion is the result (as a sanction, not a remedy).

But in the third situation, with a valid search warrant, and a search of proper scope, but a "timing" error with regard to entry, was the invasion of privacy—the entry into the home and the search—proper? Surely it *was*—the police had a right under law to make it. Was the seizure of property appropriate? Surely it *was*—the police had a right under law to seize it. Does employing the *same* "sanction" where the police had every right to search and seize, but entered too quickly, as when the police had no right to invade premises and seize property at all make any sense? Surely *not*—in the first two situations privacy has been improperly invaded; but in the third, the knock and announce "failure," it has been *validly* invaded. *Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense*. These violations are simply different in *kind*, and, most respectfully, Respondent submits that it is myopic to treat them as though they were not different at all. As Chief Justice Warren noted, in a slightly different context:

> "The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective as a deterrent....Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry* v *Ohio*, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Exclusion of evidence where there has been a valid invasion of privacy, and a proper discovery and seizure of evidence, then, is not, respondent submits, an appropriate sanction for police "error" with regard to announcement of presence and purpose. There is no element of "causality" involved—whether viewed as a part of the doctrine of inevitable discovery, or simply and more logically as a recognition that the discovery of the evidence is not the fruit of a failure to knock and announce, given that the invasion of privacy involved is completely justified—and exclusion makes no sense, simply thwarting the enforcement of the law, and giving unwarranted immunity to one in possession of drugs. Indeed, no court would, for example, suppress where a search of improper scope occurred but where the contraband sought was found within areas that *were* within the scope of the warrant.

In *no other situation* is an exclusionary sanction applied when the result of its application is to put the police in a worse position than they would have been had the Fourth Amendment violation never occurred; *always* it is applied to prevent the police from being in a *better* position *because* of the violation because of a causal connection between the evidence discovered and the constitutional error. See *Nix* v *Williams*, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501 (1984); *Murray* v *United States*, 487 US 533, 101 L Ed 2d

472, 108 S Ct 2529 (1988). See also *United States* v *Jones*, 149 F3d 715 (1998):

> A causal link between unlawful police conduct and a seizure is *necessary but not sufficient* to justify the exclusion of reliable evidence. The inevitable discovery doctrine...and the independent source doctrine...show that violations of the fourth amendment do not automatically lead to suppression when the constitutional wrong plays a causal role in the seizure (at least, in the timing of the seizure). Because the exclusionary rule 'detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions,'...,the Supreme Court is unwilling to sanction its use in marginal cases....*Wilson* reserved the question whether (and, if so, how) the inevitable-discovery and independent-source exceptions to the exclusionary rule apply to searched deemed unreasonable only because officers armed with a warrant failed to make a proper announcement at the door. *It is hard to understand how the discovery of evidence inside a home could be anything but 'inevitable' once the police arrive with a warrant*; an occupant would hardly be allowed to contend that, had the officers announced their presence and waited longer to enter, *he would have had time to destroy the evidence*....But because the entry at the front door played no role in the chain of events leading to Jones's seizure on the lawn, we, too, can leave the inevitable-discovery question for another day (emphasis supplied). 149 F3d at 716.

If one asks the *right* question—is evidence discovered as a result of a search of proper scope and intensity pursuant to the command of a valid warrant the effect or fruit of the failure of the police either to knock and announce or to wait long enough before entering—a negative answer follows ineluctably, *unless* a purpose of the knock-and-announce requirements is to allow those inside an opportunity frustrate the warrant by hiding or destroying evidence or harming the officers who are executing it. The *wrong* question is whether the evidence is the effect or fruit of an "illegal entry" or an "illegal search," as both the entry and the search are legal; it is the *manner* of entry which is improper, and its fruit may be a broken door, and there may be no fruit at all. Exclusion of evidence in this circumstance cannot be squared with *Wong Sun* as there is no exploitation of the primary illegality, the evidence instead being discovered by "exploitation" of the command of the search warrant, not the manner of the entry, and also cannot be squared with either inevitable discovery or independent source principles. The short answer is that *but for causation* is a *necessary* but not sufficient requirement for application of the exclusionary rule, and it is *entirely missing here*. And deterrence may occur through other methods than exclusion of evidence (as it may with other improper searches which yield no fruit usable in a criminal case, or to which the defendant has no standing to object); civil suits can and are brought in these situations. See e.g. *Ayeni* v *Mottola*, 35 F3d 680 (CA 2, 1994); *Kornegav* v *Cottingham*, 120 F3d 392 (CA 3, 1997) (reversing grant of summary judgment in favor of officers executing the warrant); *Aponte Matos* v *Toledo Davila*, 135 F3d 182 (CA 1, 1998) (finding qualified immunity but only because the search took place prior to *Wilson*, and the officers were entitled to immunity as they thus did not violate "clearly established constitutional law" in the manner of entry prior to *Wilson*, a holding which would not obtain to entries after *Wilson)*

CONCLUSION

Wherefore, the respondent submits that the rule in the 7th circuit and in Michigan, applied in this case, is correct.

Respectfully submitted,

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No. 04-1360

Supreme Court, U.S.
FILED
AUG 2 5 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

STATE OF MICHIGAN,
WAYNE COUNTY CIRCUIT COURT

CASE # 98010141 NAME: HUDSON, BOOKER T. JR.

CHARGES/RESULTS: Possession with intent to deliver controlled substance <50 grams: Not Guilty; Felony Firearm: Not Guilty; Possession of controlled substance <25 grams: Guilty

DATE	PROCEEDING	RESULT
	* * *	
09/15/1998	Exam	Held, Bound Over
	* * *	
04/15/1999	Motion to Suppress Evidence	
	* * *	
10/10/2000	Evidentiary Hearing	Dismissed
	* * *	
10/22/2002	Waiver Trial	In Progress
10/23/2002	Waiver Trial	Found Guilty
	* * *	
12/19/2002	Sentence	Sentenced

RELEVANT DOCKET ENTRIES

MICHIGAN COURT OF APPEALS

Case Number: 230594 People of MI v Booker T. Hudson

* * *

10/25/2000	Claim of Appeal-Criminal
10/10/2000	Order Appealed From From: Wayne Circuit Court Case Number: 98-010141 Trial Court Judge: Thomas, Deborah A. Nature of Case: Prosecutor's Appeal Dismissal

* * *

1/31/2001	Motion: Peremptory Reversal

* * *

5/1/2001	Order: Peremptory Reversal-Grant

* * *

5/22/2001	Application for Leave to SCt

* * *

12/18/2001	SCt Order: Deny

RELEVANT DOCKET ENTRIES

MICHIGAN COURT OF APPEALS

Case Number: 246403 People of MI v Booker T. Hudson

1/29/2003	Claim of Appeal-Criminal
12/19/2002	Order Appealed From From: Wayne Circuit Court Case Number: 98-010141 Trial Court Judge: Youngblood, Carole F. Nature of Case: Control Subs-Possess < 25grs
	* * *
6/17/2004	Opinion-Memorandum Result: L/Ct Judgment/Order Affirmed
8/11/2004	Application for Leave to SCt
	* * *
1/31/2005	Deny

STATE OF MICHIGAN

36TH DISTRICT COURT FOR THE
CITY OF DETROIT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN	36th District Court No. 98-65315
vs.	
BOOKER T. HUDSON, JR.	Circuit Court No. 98-10141

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE
PATRICIA L. JEFFERSON, DISTRICT JUDGE

Detroit, Michigan – Tuesday, September 15, 1998

* * *

[p. 4]

JAMAL GOOD

DIRECT EXAMINATION

* * *

Q: Were you on duty, working with that unit, on August 27th of 1998, in the City of Detroit, with other Detroit police officers, including Police Officer Raymond Williams?

A: Yes, sir.

Q: Your assignment that afternoon was what?

A: I was the shotgun man.

Q: With the execution of a search warrant?

A: Yes, sir.

Q: What did the search warrant entitle you to do?

[p.5]

A: Search the location for weapons and narcotics.

Q: What was the location?

* * *

A: 4469 West Jeffries.

Q: That location was in the City of Detroit?

A: Yes, sir.

Q: Did you go with a crew of officers to that location in an effort to execute the search warrant?

A: Yes, sir, I did.

Q: What was your approximate time of arrival there?

A: Referring to my PCR it was 3:35.

Q: P.M.?

A: P.M.

Q: Did you effect an entry into the location based upon the search warrant?

A: Yes, sir.

Q: Did you see anything upon entry?

A: Yes, sir, I did.

Q: What?

A: The Defendant in the living room.

* * *

[p.6]

Q: When you spotted Mr. Hudson, the Defendant, tell the Judge what you saw.

A: Well, he was sitting in a chair as you go through the door.

* * *

Q: What else did you see, if anything?

A: Froze the Defendant in that area and I continued through with clearing the dwelling.

* * *

[p.7]

Q: When you saw Mr. Hudson again, where was he the second time?

A: He was already being detained standing up at which time I went over and searched him.

Q: How far was Mr. Hudson from the chair at that time?

A: Actually he was right next to the chair.

Q: When you searched Mr. Hudson your intent was what?

A: To search him for any type of weapons or narcotics that he may have had.

Q: That was for self protection purposes?

A: That's correct.

Q: Did you discover anything during the course of that pat down?

A: Yes, sir.

Q: What?

A: Mr. Hudson had five rocks of suspected cocaine in his left front pants pocket.

* * *

[p.10]

Q: This structure that you entered on Jeffries Street, was that a single family dwelling house?

A: Yes.

Q: Were there other people in the house other than [p.11] Mr. Hudson, the Defendant?

A: Yes.

Q: Where were they at?

A: Actually they were all through the house, mostly towards the rear in the kitchen area.

* * *

CROSS-EXAMINATION

* * *

[p.12]

Q: When you entered the premises you were the first person through the entryway, correct?

A: Yes.

Q: When you approached the doorway, did you knock on the door?

A: Yes. Well, I announced presence and purpose.

Q: So you were the officer that announced your presence and purpose?

A: Well, I announced and I believe other officers did because we blurt it out so everyone knows who we are and the purpose for it.

Q: But you specifically announced –

A: I did myself, yes.

Q: But you're indicating that you just approached the door and announced your presence, you did not knock on that door; is that correct?

A: I did not knock.

Q: And upon approaching that door, you would have been the person closest to the door to knock; correct?

A: Yes.

[p.13]

Q: How long after this group announcement did you enter the premises?

A: Maybe three, four seconds.

Q: So you certainly did not wait for anybody to answer the door; correct?

A: Correct.

* * *

[p.14]

Q: And you've indicated that this was – how many officers were involved in that raid?

A: I'd say about seven maybe possibly.

* * *

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE
STATE OF MICHIGAN

Case No. 98-10141
Hon: Deborah A. Thomas

vs.

BOOKER T. HUDSON,

Defendant.

MOTION TO SUPPRESS EVIDENCE AND STATEMENTS SEIZED IN VIOLATION OF THE UNITED STATES CONSTITUTION, THE MICHIGAN CONSTITUTION, AND MCL 780.656, AND REQUEST FOR EVIDENTIARY HEARING

[Filed Apr. 15, 1999]

Now comes Defendant Booker T. Hudson, by and through his attorney, Richard D. Korn, and respectfully moves this Honorable Court to suppress all evidence and statements obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article 1, Section 11 and 17 of the Michigan Constitution of 1963, and MCL 780.656, and in support of this motion, states as follows:

1. Defendant is charged with Possession with Intent to Deliver Less than 50 Grams of Cocaine, MCL 333.7401(2)(a)(iv), and Felony Firearm, MCL 750.227b.

2. On August 27, 1998, the police executed a search warrant at 4469 West Jeffries, Detroit, Michigan.

3. The police did not properly knock and announce their presence before forcing entry into the apartment, and the subsequent search and seizure was in violation of the laws and constitutions of the State of Michigan and the United States.

4. All evidence and statements obtained as a result of the unlawful entry should be suppressed as "fruit of the poisonous tree."

Wherefore, Defendant respectfully moves this Honorable Court to suppress all evidence and statements obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article 1, Section 11 and 17 of the Michigan Constitution of 1963, and MCL 780.656.

Defendant respectfully requests an evidentiary hearing in connection with this motion and respectfully requests the production of police officer Jamal Good at the evidentiary hearing.

BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND STATEMENTS SEIZED IN VIOLATION OF THE UNITED STATES CONSTITUTION, THE MICHIGAN CONSTITUTION, AND MCL 780.656, AND REQUEST FOR EVIDENTIARY HEARING

The Fourth and Fourteenth Amendments to the United States Constitution, Article 1, Section 11 and 17 of the Michigan Constitution of 1963, and MCL 780.656 require police officers to knock and announce their presence and purpose prior to entering a premises. Police officers executing a search warrant may forcibly enter the

premises only after they are refused admittance after adequately announcing their authority and purpose. *Wilson v Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). An informant's report of the presence of firearms inside the residence and the fear of the agents that evidence may be destroyed is not sufficient to provide the exigent circumstances necessary to excuse the knock an [sic] announce requirement. *United States v Bates*, 84 F.3d 790 (1996). The burden is on the prosecution to establish by a preponderance of the evidence that the search and seizure was constitutionally valid. *Schneckloth v Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v Finch*, 998 F.2d 349 (1993). All evidence and statements obtained as a result of the illegal entry should be suppressed as fruit of the poisonous tree. *Wong Sun v United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In the case at bar, the police officers failed to adequately knock and announce their authority and purpose prior to forcing entry into the targeted premises. The officers announced their presence and purpose but waited only three to five seconds before ramming the door and entering the premises. At the preliminary examination, police officer Jamal Good specifically stated that the officers rammed the door without giving anyone an opportunity to answer the door (Exam T. 13). It is manifest that the police did not wait to be refused admittance before forcibly entering the premises, and the subsequent search of the premises was in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article 1, Section 11 and 17 of the Michigan Constitution of 1963, and MCL 780.656. The evidence and statements

seized as a result of the illegal search and seizure should be suppressed. *Wong Sun v United States, supra.*

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

vs.

BOOKER HUDSON,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL
AND IN SUPPORT OF MOTION
FOR PEREMPTORY REVERSAL

* * *

[p.4]

The People bring this appeal, arguing that while the police officers may have violated the knock-and-announce statute, MCL 780.656; MSA 28.1259(6), and also the Fourth Amendment, suppression is an inappropriate sanction. No sound was heard inside or outside the house suggesting an attempt to destroy property, or escape, or endanger the police officers, yet the officers [p.5] broke into the house immediately after announcing their purpose, the door being broken down within five seconds after "Police" was announced by the officers.

* * *

[p.6]

The trial court committed clear legal error in failing to follow Michigan Supreme Court precedent which has not been overruled by the United States Supreme Court and does not conflict with United States Supreme Court decisions. The trial court's application of the exclusionary

rule to a violation of the knock-and-announce rule resulting in suppression of the evidence is contrary to Michigan Supreme Court precedent and must be overruled.

* * *

[p.7]

Dated: January 31, 2001

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN

Plaintiff-Appellant,

vs.

BOOKER HUDSON,

Defendant-Appellee.

Court of Appeals
No: 230594
Lower Court No: 98-10141

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

* * *

[p.5]

It is undisputed that there was a violation of the knock and announce requirement incorporated into the Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment to the United States Constitution. No sound was heard inside or outside the house suggesting an attempt to destroy property, or escape, or endanger the police officers, yet the police officers broke into the house immediately after [p.6] announcing their purpose, the door being broken down within three to five seconds after "police" was announced by the officers (Appellant's Brief, Pg. 4; Evidentiary Hearing Transcript, Pgs. 13-17). Police Officer Jamal Good testified that the officers did not wait to see if anybody would answer the door (Evidentiary Hearing Transcript, Pg. 15).

Notwithstanding the decisions of the Michigan Supreme Court holding that the exclusionary rule does not apply to a violation of the Fourth Amendment "knock and

announce" principle, the trial court suppressed the evidence. The issue before this Honorable Court is whether the trial court was bound by Michigan Supreme Court precedent as to issues of federal constitutional law where the Michigan Supreme Court decisions were contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. It is defendant's position that the trial court was not bound by such precedent and that the decision of the trial court suppressing the evidence seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution should be affirmed.

* * *

[p.18]

Dated: 4/3/01

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT
CRIMINAL DIVISION

PEOPLE OF THE
STATE OF MICHIGAN

Case No. 98-10141

vs.

BOOKER HUDSON,

Defendant.

WAIVER TRIAL – VOLUME I of II

BEFORE THE HONORABLE
DEBORAH A. THOMAS, JUDGE
THIRD JUDICIAL CIRCUIT COURT
CRIMINAL DIVISION
Tuesday, October 22, 2002, Detroit, Michigan

* * *

[p.6]

JAMAL GOOD

DIRECT EXAMINATION

* * *

Q: Do you remember what order did you enter?

A: I was first through the door.

Q: Were you given a title assignment?

A: Yes, sir, I was the shotgun man.

Q: You're the shotgun man. That's the language we understand. And as you entered the location, explain to the Judge how you entered, from the minute you entered the location, what happened, what did you see?

A: As I go in, I see the defendant sitting in a chair up against the east wall.

Q: You say the Defendant. Is that somebody you see in [p.7] the courtroom today?

A: Yes, sir. The gentleman in the blue shirt sitting with the defense counsel.

MR. HAMMOUD [Prosecutor]: For the record, identifying the Defendant, Booker Hudson.

Q: Did you know Mr. Hudson before that day?

A: No, sir.

Q: And you said he was sitting in a chair?

A: Yes, sir.

Q: Against what?

A: The east wall.

Q: Let me ask you first, were you the person to open the door to the location?

A: Yes, sir.

Q: Did you knock? What happened? Explain to us the entry.

A: I announced our presence and purpose and went into the dwelling.

Q: How long did you wait after you announced your –

THE COURT: That doesn't tell me anything.

MR. HAMMOUD: I'm going to ask him for more details.

THE COURT: Thank you.

[p.8]

Q: I want details. You announce your presence and purpose. How do you do that? You stand at the door, what do you say?

A: Police, search warrant.

Q: Did you knock on the door?

A: No.

Q: So you are out there. Was there a porch?

A: I believe there is a porch. I don't really recall the front of the house.

Q: Police, search warrant and you opened that door?

A: Yes, sir.

Q: Did you have to break it down?

A: I don't believe we had to force it.

Q: Was it a front door that you can just open like a knob that's not locked, or how was it, if you remember?

A: I believed I just opened the door and went in. Turned the knob and went inside. I'm not sure it was a screen door, if it was the interior door.

Q: How long did you wait from the time you said, police, search warrant, and the time you opened the door and went inside?

A: I guess maybe three to five seconds.

Q: Pretty fast?

A: Real fast, yes.

[p.9]

Q: Did you wait to see if somebody comes and open the door?

A: No. No.

Q: Why did you go in right away?

A: It's a safety factor. I've been shot at numerous times going into drug houses. So it's a safety factor.

Q: And besides the Defendant inside, who did you see, civilians, I mean? I'm sorry. Other than the people that came with you, who did you see inside?

A: There were numerous other persons running throughout the house.

Q: And the Defendant was sitting?

A: Yes, sir, he was.

Q: Did he try to run when you entered?

A: No, sir, he didn't.

Q: Tell us what else did you see the Defendant or around him?

A: Just other personnel. There were other people in the house. He was sitting in a chair. He didn't try to run.

* * *

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN

Case No. 98-10141

vs.

BOOKER HUDSON,

Defendant.

WAIVER TRIAL – VOLUME II of II

BEFORE THE HONORABLE
DEBORAH A. THOMAS, JUDGE
THIRD JUDICIAL CIRCUIT COURT
CRIMINAL DIVISION
Wednesday, October 23, 2002, Detroit, Michigan

* * *

[p.125]

VERDICT OF THE COURT

* * *

Certainly, it's unquestionable that at a minimum, the Defendant possessed the drugs that were in his pants. They were on his person. As to the drugs that were found on the coffee table, there is no testimony that the Court can look at to determine where that came from. So I cannot assign it to anybody.

* * *

[p.127]

So for the purposes of constructive possession as it relates to the weapon, the Court finds that the Court cannot find a nexus between the weapon unique unto the Defendant because of where it was found was not in a space unique to his use or a piece of furniture unique to his use. So I'm – for those reasons and in keeping with that law as the Court views it, I'm going to have to find him not guilty on the felony firearm.

* * *

[p.129]

So for those drugs that were certainly found on his person, he is certainly guilty of possession. He is being charged with possession with the intent to deliver. I've only got five rocks that I can attribute to him at this juncture. He says he was on the receiving end. I find him guilty of possession with intent – possession, not the intent, possession of a controlled substance same being cocaine.

* * *

THE COURT: Do I have to say how many grams of cocaine he possessed?

MR. HAMMOUD: If you don't, your Honor, the [p.130] default is less than 25. I talked about it.

THE COURT: Well, when they test it out, it was less than 25 grams.

* * *

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT –
CRIMINAL DIVISION

PEOPLE OF THE
STATE OF MICHIGAN

File No. 98-10141

v

BOOKER HUDSON,

Defendant.

SENTENCE

BEFORE THE HONORABLE
CAROLE F. YOUNGBLOOD, JUDGE
Detroit, Michigan – December 19, 2002

* * *

[p.5]

THE COURT: Okay. I'm going to sentence you to 18 months probation under the following conditions: First of all, you must enter a residential substance abuse treatment program and finish that program. And when you get out, you must have alcohol and drug testing whenever your probation officer tells you to do so. You must go to Narcotics Anonymous meetings at least three times per week. I'm only doing it to help you stay off of drugs. And you must not change your residence without the permission of the Probation Officer. . . . You must pay a supervision fee of $180 at the rate of $10 per month. You must pay court costs of $165 a year at the rate of $16.50 per month. And you must pay your court

appointed attorney fees once they have been determined. You have credit for 59 days that you spent in jail.

* * *

(4)

No. 04-1360

Supreme Court, U.S.
FILED
AUG 25 2005
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In The Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

v.

MICHIGAN,

Respondent.

ECTED COPY

On Writ Of Certiorari To The Michigan Court Of Appeals

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QUESTION PRESENTED

Does the inevitable discovery doctrine create a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation?

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ORDERS AND OPINIONS BELOW

The Michigan Court of Appeals' May 1, 2001, order peremptorily reversing the trial court's decision to suppress the evidence found in Petitioner's home is unreported. Pet. App. 4. The Michigan Supreme Court's December 18, 2001, order denying Petitioner's application for leave to appeal from that order is reported as *People v. Hudson*, 639 N.W.2d 255 (Mich. 2001). Pet. App. 5.

The Michigan Court of Appeals' June 17, 2004, opinion affirming Petitioner's conviction is unreported. Pet. App. 1-2. The Michigan Supreme Court's January 31, 2005, order denying Petitioner's application for leave to appeal from that opinion is reported as *People v. Hudson*, 692 N.W.2d 385 (Mich. 2005). Pet. App. 3.

JURISDICTION

The Michigan Supreme Court's order denying Petitioner's application for leave to appeal was entered on January 31, 2005. The petition for writ of certiorari was timely filed on April 4, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the afternoon of August 27, 1998, approximately seven Detroit police officers arrived at the home of Petitioner Booker T. Hudson, Jr., to execute a search warrant for narcotics. J.A. 4-5, 8. There is no evidence in the record that the officers had any reason to believe that anyone in the home would attempt to destroy evidence, escape, or resist the execution of the warrant. Officer Jamal Good, the first member of the raiding party to enter the house, testified that he did not see or hear any activity inside the home as the officers approached the door. Pet. App. 8.

Upon arriving at the door to Petitioner's home, some of the officers shouted, "Police, search warrant." Pet. App. 7; J.A. 19. The officers did not knock, and they waited only three to five seconds before opening the door and entering. Pet. App. 8-9; J.A. 7-8, 19. Officer Good explained that the brief delay between the announcement and his entry was "[a]bout how long it took me to go in the door," Pet. App. 8, and he characterized the entry after the announcement as "[r]eal fast." J.A. 19. Officer Good confirmed that the officers did not wait to see if anyone would answer the door. Pet. App. 9; J.A. 8, 20.

Immediately upon entering the home, Officer Good found Petitioner seated in a chair in the living room and ordered him to freeze. J.A. 5-6, 18, 20. After walking through the home and encountering several other people, Officer Good returned to the living room and searched

Petitioner. J.A. 6-7, 20. Officer Good found five rocks of crack cocaine in Petitioner's pants pocket. J.A. 6-7.

Based on the cocaine found in Petitioner's pants, as well as additional cocaine and a gun that the police found elsewhere in the house, Petitioner was charged in Wayne County Circuit Court with possession of cocaine with intent to deliver and possession of a firearm during the commission of a felony ("felony firearm"). J.A. 1. Petitioner moved to suppress the evidence found in his home on the ground that the police had violated the Fourth Amendment and Michigan law by failing to knock and announce before entering his home. J.A. 9-12.

While Petitioner's motion to suppress was pending in the trial court, the Michigan Supreme Court held in *People v. Stevens*, 597 N.W.2d 53, 59-62 (Mich. 1999), that evidence found after a Fourth Amendment knock and announce violation is not subject to suppression. According to *Stevens*, suppression is "not an appropriate remedy" because the evidence "would have been inevitably discovered . . . had the police adhered to the knock-and-announce requirement." *Id.* at 62.

At the evidentiary hearing on Petitioner's motion to suppress, Officer Good testified that he and the other officers did not knock and that they waited only three to five seconds after announcing their presence before entering Petitioner's home. Pet. App. 7-9. After this testimony, the prosecutor conceded that the police had violated the knock and announce requirement. Pet. App. 9-10. The trial court suppressed the evidence and dismissed the charges against Petitioner. Pet. App. 10.

Respondent appealed to the Michigan Court of Appeals and moved for peremptory reversal of the trial

court's order. In its brief, Respondent agreed that the officers "may have violated . . . the Fourth Amendment" but, relying on *Stevens*, argued that the evidence found after the violation was not suppressible. J.A. 13-14. Petitioner responded by arguing that *Stevens* was contrary to the decisions of this Court. J.A. 15-16. On May 1, 2001, the Michigan Court of Appeals peremptorily reversed the suppression order on the basis of *Stevens* and *People v. Vasquez*, 602 N.W.2d 376 (Mich. 1999), in which the Michigan Supreme Court reaffirmed *Stevens*. Pet. App. 4.

Petitioner then filed a timely application for leave to appeal to the Michigan Supreme Court in which he argued that *Stevens* and *Vasquez* were wrongly decided. On December 18, 2001, the Michigan Supreme Court denied Petitioner's application by a vote of five to two. Pet. App. 5. In its order, the Michigan Supreme Court reaffirmed its decisions in *Stevens* and *Vasquez* while acknowledging that the Sixth Circuit had reached a contrary conclusion in *United States v. Dice*, 200 F.3d 978 (6th Cir. 2000). Pet. App. 5.

Petitioner's case then returned to the Wayne County Circuit Court for trial. After a two-day bench trial, the judge found that the prosecution had failed to prove that Petitioner possessed the gun or most of the cocaine found in the home and therefore acquitted him of the charged offenses of felony firearm and possession of cocaine with intent to deliver. J.A. 21-22. The judge did, however, find Petitioner guilty of the lesser offense of possession of less than 25 grams of cocaine, based on the five rocks of cocaine found in his pants. J.A. 22. The judge sentenced Petitioner to probation for that offense. J.A. 23-24.

Petitioner appealed his conviction and again argued that the evidence found in his home should have been suppressed because of the knock and announce violation. The Michigan Court of Appeals affirmed Petitioner's conviction on June 17, 2004, observing that it was bound to uphold the admission of the evidence both by *Stevens* and *Vasquez* and by the law of the case doctrine. Pet. App. 1-2.

Petitioner then filed a timely application for leave to appeal to the Michigan Supreme Court in which he again argued that *Stevens* and *Vasquez* were wrongly decided. On January 31, 2005, the Michigan Supreme Court denied Petitioner's application by a vote of six to one. Pet. App. 3.

Petitioner filed a petition for writ of certiorari on April 4, 2005, and this Court granted the petition on June 27, 2005.

SUMMARY OF ARGUMENT

The evidence seized in a home following a knock and announce violation should be suppressed because the evidence is the fruit of an illegal entry. In fact, the Court has itself twice ordered the suppression of evidence found in homes following knock and announce violations. In those two cases and several others, the Court has specifically recognized that an entry is illegal when the police, without justification, violate the knock and announce requirement.

Given that an entry is illegal when the police violate the knock and announce requirement, the evidence found inside following such an entry is the direct and suppressible fruit of

the illegality, just as evidence must be suppressed following other forms of illegal police entry. Therefore, the Michigan Supreme Court erred in concluding that lawful authority to enter and search a home is a source of the evidence independent from the illegal entry into the home.

Since there was no independent process, there was no inevitable discovery. The inevitable discovery doctrine requires that the prosecution identify a source that would have produced the evidence by means independent of the tainted source that actually produced it. In Petitioner's case, there was no independent process and therefore no inevitable discovery because the police who violated the knock and announce requirement immediately barged into his home and seized the evidence.

The Michigan Supreme Court's version of the inevitable discovery doctrine would swallow the exclusionary rule. Under this version of inevitable discovery, a court cannot suppress evidence if doing so would place the prosecution in a worse position than it would have enjoyed had the police acted lawfully instead of unlawfully. This version of inevitable discovery is directly contrary to many cases in which this Court has excluded evidence and thereby placed the prosecution in a worse position than it would have been in had the police acted lawfully. Instead, the proper test is whether the police inevitably would have obtained the same evidence if they had refrained from the tainted activity – that is, whether the police would have obtained the same evidence through means independent of the violation.

If the Michigan Supreme Court's version of inevitable discovery were extended to all types of constitutional violations, the police would have no incentive to avoid

unconstitutional shortcuts so long as the prosecution could plausibly claim that the police could have been able to find the same evidence without acting illegally. For example, police with probable cause to search a home would not bother to obtain a warrant before searching because they would know that exclusion would put the prosecution in a worse position than it would have enjoyed had the police obtained a warrant. By the same token, the Michigan Supreme Court's *per se* rule of inevitable discovery means that the police have no incentive to knock and announce because they know that the evidence will come in despite the violation.

This Court has long recognized that other remedies cannot effectively substitute for the exclusionary rule. The police do not face any realistic threat of civil liability for knock and announce violations because damages are difficult to assess and because various barriers prevent recovery in any event. This Court's precedents confirm that the knock and announce rule protects important privacy interests and that only the threat of exclusion can force the police to respect those interests.

ARGUMENT

I. Evidence Found in a Home Following a Fourth Amendment Knock and Announce Violation Is Suppressible Fruit of the Illegal Entry.

A. The Evidence Found Inside a Home Following a Knock and Announce Violation Is the Fruit of an Illegal Entry Because the Violation Renders the Entry Illegal.

In *Wilson v. Arkansas*, 514 U.S. 927, 937 n.4 (1995), this Court noted that the state had argued that evidence seized after a Fourth Amendment knock and announce violation should not be excluded because such evidence is "causally disconnected from the constitutional violation and . . . exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation." This Court declined to reach this argument because the lower courts had not addressed it and because it was not within the question for which certiorari had been granted. *Id.*

Seizing upon the argument this Court declined to address in *Wilson*, the Michigan Supreme Court has concluded that evidence seized after a knock and announce violation is never excludable. *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999), *cert. denied*, 528 U.S. 1164 (2000). The Michigan Supreme Court reasoned that it "was not the means of entry that led to the discovery of the evidence, but, rather, it was the authority of the search warrant that enabled the police to search and seize the contested evidence." *Id.* at 64.

This Court's precedents do not support the notion that evidence seized after a knock and announce violation is *per se* admissible. In fact, this Court has itself twice held

that a knock and announce violation requires exclusion of the evidence found inside the home following the violation. *See Miller v. United States*, 357 U.S. 301 (1958); *Sabbath v. United States*, 391 U.S. 585 (1968). That is, this Court had twice recognized long before *Wilson* that a knock and announce violation renders the entry illegal and, therefore, that the search inside the home following the violation is the fruit of the illegal entry. *Wilson* and its progeny reaffirm that a knock and announce violation is not independent from the entry and subsequent search.

1. This Court Has Long Recognized That a Knock and Announce Violation Renders the Entry Illegal and Requires Suppression of Evidence Seized from Inside the Home.

In *Miller*, a police officer forcibly entered an apartment in order to arrest a suspect for narcotics offenses and subsequently found evidence of those offenses in the apartment. 357 U.S. at 302-304. The defendant moved to suppress the evidence found in his apartment on several grounds, including that the police had violated the knock and announce requirement codified at 18 U.S.C. § 3109. *Id.* at 305. After a lengthy review of the common-law history behind § 3109, this Court concluded that the officer had failed to give proper notice before forcibly entering the apartment. *Id.* at 306-313.

In so holding, this Court observed that the knock and announce requirement "is deeply rooted in our heritage and should not be given grudging application" and that, by codifying a "tradition embedded in Anglo-American law," Congress had affirmed "the reverence of the law for the individual's right of privacy in his house." *Id.* at 313. This

Court then concluded that the violation of the knock and announce requirement rendered illegal both the entry into the apartment and the arrest inside and that the evidence seized from the home must therefore be suppressed:

> The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. *Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.*

Id. at 313-314 (emphasis added).

In *Sabbath*, this Court again suppressed evidence because of a knock and announce violation. As in *Miller*, the police in *Sabbath* violated § 3109 when they entered an apartment to arrest a suspect. 391 U.S. at 587-588. Unlike *Miller*, the police in *Sabbath* did not have to break the door to enter. *Id.* at 587. Concluding that this fact made no difference, the Court again ruled that the knock and announce violation rendered illegal both the entry and the police activity inside the home and therefore required exclusion of the evidence seized there:

> The issue in this case is whether petitioner's arrest was invalid because federal officers opened the closed but unlocked door of petitioner's apartment and entered in order to arrest without first announcing their identity and purpose. *We hold that the method of entry vitiated the arrest and therefore that evidence seized in the subsequent search incident thereto should not have been admitted at petitioner's trial.*

Id. at 586 (emphasis added).

Miller and *Sabbath* thus confirm that a knock and announce violation is not somehow causally disconnected from the evidence seized inside the home after the entry. To the contrary, the knock and announce requirement, like the warrant requirement, is an integral part of a legal entry unless exigent circumstances excuse compliance. The violation of that requirement makes the entry illegal, and the evidence found inside after the illegal entry must therefore be suppressed.

Indeed, *Miller* and *Sabbath* are simply applications of the general and longstanding principle that "[t]he exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *see also id.* at 485-486 (observing that exclusionary rule also requires suppression of verbal evidence derived from illegal intrusion). Therefore, any kind of evidence found inside private premises following a police entry that is illegal for any reason is inadmissible. *See, e.g.*, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390-392 (1920) (barring derivative use of documents seized after officers illegally made warrantless entry to search); *Wong Sun*, 371 U.S. at 482-487 (excluding verbal evidence obtained after officers illegally entered home to arrest without probable cause and without knocking and announcing); *Payton v. New York*, 445 U.S. 573 (1980) (excluding evidence seized in home after illegal warrantless entry to arrest); *cf. New York v. Harris*, 495 U.S. 14 (1990) (holding admissible verbal statements obtained *outside* home after illegal warrantless entry to arrest).

This Court has never deviated from the rule that *all* evidence, tangible or verbal, "which derives so immediately

from an unlawful entry" is "the 'fruit' of official illegality." *Wong Sun*, 371 U.S. at 485. Given that this Court squarely held in *Miller* and *Sabbath* that a knock and announce violation renders the entry unlawful and the search that follows inside unreasonable, the evidence found inside a home following a knock and announce violation must be suppressed.

2. This Court's More Recent Cases Confirm That a Knock and Announce Violation Renders Unreasonable the Search and Seizure That Follow the Entry.

In 1995, this Court unanimously held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 514 U.S. at 929. Relying on much of the same common-law history that had led the Court to observe nearly forty years earlier that the knock and announce requirement "is deeply rooted in our heritage," *Miller*, 357 U.S. at 313, this Court held in *Wilson* "that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." 514 U.S. at 934.

In reaching this conclusion, this Court repeatedly recognized, just as it did in *Miller* and *Sabbath*, that a knock and announce violation is directly connected to the search and seizure that follows the illegal entry. Thus, this Court explained that "we have little doubt that the Framers of the Fourth Amendment thought that the *method of an officer's entry* into a dwelling was among the factors to be considered in assessing the *reasonableness of a search or seizure*." *Id.* (emphasis added); *see also id.* at 931 ("An examination of the common law of search and seizure

leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."); *id.* at 936 ("We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.").

Wilson thus affirmed that the Fourth Amendment reasonableness of a search and seizure inside a dwelling is directly connected to whether the officers knocked and announced before entering. Accordingly, the Michigan Supreme Court's attempt to treat the knock and announce violation as "independent of" the subsequent search and seizure, *Stevens*, 597 N.W.2d at 64, is insupportable.

This Court's decisions since *Wilson* also lend no support to the claim that a knock and announce violation is independent of the search and seizure that follows the violation. In *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court held that the police were justified in performing a no-knock entry under the particular facts confronting them, but rejected a state court decision excluding all felony drug searches from the knock and announce requirement. The unanimous opinion in *Richards* never suggests that the defendant's argument to suppress must fail because the no-knock entry into his motel room was somehow causally disconnected from the seizure of drugs and money that followed the entry. On the contrary, this Court expressed concern that if it upheld *per se* exceptions from the knock and announce rule, "the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Id.* at 394.

This Court unanimously held in its next knock and announce case, *United States v. Ramirez*, 523 U.S. 65 (1998), that an otherwise justifiable no-knock entry did not become unreasonable merely because the police damaged property during the intrusion. In so holding, this Court specifically noted the distinction, for evidence suppression purposes, between violations that render the entry unlawful and those that do not:

> This is not to say that the Fourth Amendment speaks not at all to the manner of executing a search warrant. The general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, *even though the entry itself is lawful* and the fruits of the search are not subject to suppression.

Id. at 71 (citation omitted; emphasis added).

Ramirez thus recognized (albeit in dicta[1]) that some Fourth Amendment violations unrelated to the lawfulness of the entry, such as unnecessary property destruction, might not result in suppression of evidence. But as *Miller*, *Sabbath*, and *Wilson* confirm, the *Ramirez* dictum does not apply to violations of the knock and announce requirement because violations of that requirement do render the entry unlawful.

---

[1] This Court declined to decide whether the breaking of the window in *Ramirez* bore a "sufficient causal relationship" to the discovery of the guns inside the home. *Id.* at 72 n.3.

Ramirez also confirmed that the statutory knock and announce requirement that the Court had applied in *Miller* and *Sabbath* was a codification of the same common law that, in turn, "informs the Fourth Amendment." 523 U.S. at 73. Thus, this Court concluded that the constitutional standards the Court had applied in *Wilson* and *Richards* were congruent with the statutory standards applied in *Miller* and *Sabbath*.

In its most recent knock and announce decision, *United States v. Banks*, 540 U.S. 31 (2003), this Court unanimously concluded that there was no violation because, unlike the instant case, the police waited a reasonable amount of time after knocking and announcing before forcing entry. Even though the government urged this Court in *Banks* to hold that the evidence should not be suppressed even if there was a knock and announce violation, Brief of United States in No. 02-473 at 25-29, the Court's opinion does not even mention this argument or provide any support for the notion that the evidence found in the apartment was somehow causally disconnected from the entry. This Court did confirm again in *Banks* that the federal statute applied in *Miller* and *Sabbath* was congruent with the Fourth Amendment understanding of the knock and announce requirement developed in *Wilson*. 540 U.S. at 42-43.

In sum, this Court's knock and announce cases, both before and after *Wilson*, confirm that a violation of the requirement renders the entry and the subsequent search illegal. Therefore, as with other types of illegal entries, a knock and announce violation requires the exclusion of evidence found inside the dwelling immediately following the entry.

B. The Evidence Found Inside a Home Following a Knock and Announce Violation Is Not Subject to a *Per Se* Inevitable Discovery Exception.

Despite the fact that this Court has itself ordered the suppression of evidence found in homes after knock and announce violations, *see Miller* and *Sabbath*, *supra*, the Michigan Supreme Court has held that such evidence is never suppressible on the ground that the evidence would have been inevitably discovered if the police had knocked and announced. *Stevens*, 597 N.W.2d at 62; Given this *per se* rule, courts in Michigan no longer have any reason to decide whether knock and announce violations have occurred. *See People v. Vasquez*, 602 N.W.2d 376, 378 (Mich. 1999) (*per curiam*) ("In light of our recent decision in [*Stevens*], we need not decide whether the police violated the constitutional and statutory knock-and-announce requirement").

At least ten federal and state appellate courts have rejected the position of the Michigan Supreme Court by squarely holding that the inevitable discovery doctrine does not exempt knock and announce violations from the exclusionary rule. *See United States v. Dice*, 200 F.3d 978, 984-986 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1220 (8th Cir. 1993); *Mazepink v. State*, 987 S.W.2d 648, 657-658 (Ark.), *cert. denied*, 528 U.S. 927 (1999); *Kellom v. State*, 849 So. 2d 391, 396 (Fla. Dist. Ct. App. 2003); *People v. Tate*, 753 N.E.2d 347, 351-352 (Ill. App. Ct. 2001); *State v. Lee*, 821 A.2d 922, 931-946 (Md. 2003); *State v. Taylor*, 733 N.E.2d 310, 312 (Ohio Ct. App. 1999); *Commonwealth v. Rudisill*, 622 A.2d 397, 400 n.7 (Pa. Super. Ct. 1993); *State v. Lee*, 836 S.W.2d 126, 128-130 (Tenn. Crim. App. 1991); *Price v. State*, 93 S.W.3d 358,

370-372 (Tex. App. 2002). Only one appellate court, the Seventh Circuit, has endorsed the Michigan Supreme Court's position. *United States v. Langford*, 314 F.3d 892, 894-895 (7th Cir. 2002), *cert. denied*, 540 U.S. 1075 (2003). Courts in many other jurisdictions have assumed that evidence seized inside a home after a knock and announce violation is the fruit of the violation and have therefore suppressed such evidence. *See, e.g., United States v. Cantu*, 230 F.3d 148, 153 (5th Cir. 2000); *United States v. Gallegos*, 314 F.3d 456, 458 (10th Cir. 2002); *State v. Cohen*, 957 P.2d 1014, 1017 (Ariz. Ct. App. 1998); *District of Columbia v. Mancouso*, 778 A.2d 270, 275 (D.C. 2001); *State v. Harada*, 41 P.3d 174, 176 (Haw. 2002); *State v. Nelson*, 817 So. 2d 158, 165-166 (La. Ct. App. 2002); *Commonwealth v. Jimenez*, 780 N.E.2d 2, 5-10 (Mass. 2002); *Garza v. State*, 632 N.W.2d 633, 640 (Minn. 2001); *State v. Ricketts*, 981 S.W.2d 657, 662 (Mo. Ct. App. 1998); *State v. Anyan*, 104 P.3d 511, 525 (Mont. 2004); *State v. Johnson*, 775 A.2d 1273, 1283-1284 (N.J. 2001); *State v. Reynaga*, 5 P.3d 579, 582-583 (N.M. Ct. App. 2000); *City of Bismarck v. Glass*, 581 N.W.2d 474, 477 (N.D. Ct. App. 1998); *Park v. Commonwealth*, 528 S.E.2d 172, 177 (Va. Ct. App. 2000). The clear majority of state and federal courts thus continue to suppress evidence seized from homes immediately after knock and announce violations, just as this Court did in *Miller* and *Sabbath*.

In refusing to suppress such evidence, the Michigan Supreme Court distorted the inevitable discovery doctrine. That court jettisoned any requirement that the prosecution prove that the evidence would have been found through means independent of the tainted police activity. Instead, *Stevens* held that the evidence should not be suppressed because police would have found it had they

not committed the violation. That is, *Stevens* adopted a version of the inevitable discovery doctrine that admits evidence so long as the police can claim "if we hadn't done it wrong, we would have done it right." *See* 6 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 11.4(a), at 272-274 (4th ed. 2004) (criticizing such reasoning and characterizing *Stevens* as an "absurdity" that adopted an "Alice-in-Wonderland version of inevitable discovery").

As the many courts that have rejected the Michigan Supreme Court's position have recognized, a *per se* rule of inevitable discovery eviscerates the knock and announce requirement. Police officers in Michigan currently have no reason ever to knock and announce before entering a home because they know that the evidence they find will always be admitted despite the violation. The radical version of inevitable discovery adopted in *Stevens*, if extended beyond the knock and announce context, would also effectively destroy any incentive the police may have to comply with many other constitutional rules, including the warrant requirement.

1. Inevitable Discovery Requires Proof That the Evidence Would Have Been Found Through a Source Independent of the Violation.

This Court adopted the inevitable discovery doctrine in *Nix v. Williams*, 467 U.S. 431 (1984). In *Nix*, a police detective had violated the defendant's Sixth Amendment right to counsel by deliberately eliciting incriminating statements from him after he had invoked his right to counsel at an arraignment. Those statements led the police to the location of the victim's body. *Id.* at 436. At Williams'

first trial, the prosecution introduced his statements and evidence derived from the body, but this Court ultimately concluded that the statements should have been suppressed. *See Brewer v. Williams*, 430 U.S. 387 (1977). On retrial, the prosecution did not introduce Williams' statements but did introduce evidence derived from the body. The state courts upheld the introduction of evidence from the body on the theory that it would have been inevitably discovered by search parties that were nearing the location of the body at the time Williams led the police there. *Nix*, 467 U.S. at 436, 437-439.

In upholding that result, this Court stressed that the inevitable discovery doctrine is "closely related" to the independent source doctrine, which, in turn, "allows admission of evidence that has been discovered by means *wholly independent* of any constitutional violation." *Id.* at 443 (emphasis added). This Court explained the rationale for both doctrines:

> When the challenged evidence has an *independent source*, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule.

Id. at 443-444 (emphasis added).

Nix rejected the argument that the inevitable discovery doctrine would undermine the deterrent effect of the exclusionary rule because "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." *Id.* at 445. That is, since the inevitable discovery doctrine, like the independent source doctrine, requires proof of an *independent* process that would have produced the same evidence, the officer illegally seizing the evidence will rarely, if ever, know whether there happens to be an untainted independent source leading to the same evidence. Even if he does know of such an independent source, he is very unlikely to know the probability that the independent source will produce the same evidence in the same condition.

The independent source in *Nix* itself illustrates this point. Organized search parties systematically combing the countryside were within two and one-half miles of the culvert where the body was found at the time the search was suspended. *Id.* at 448-449. This Court thus found that "the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found." *Id.* at 449-450. Admitting the body in *Nix* thus did not undermine the deterrence rationale of the exclusionary rule because the detective who illegally questioned Williams could not have known at the time of the violation that the search parties would have soon discovered the body.

This Court reaffirmed the close relationship between the independent source and inevitable discovery doctrines in *Murray v. United States*:

> The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.

487 U.S. 533, 539 (1988) (emphasis in original).

Murray is illustrative of the type of independent activity necessary to invoke the independent source or inevitable discovery doctrines. In *Murray,* federal agents illegally entered a warehouse and observed bales of marijuana, but did not seize them. *Id.* at 535. The agents then applied for and obtained a warrant to search the warehouse without mentioning the prior entry or the observations they had made during that entry. *Id.* at 535-536. Armed with the warrant, the agents then re-entered the warehouse and seized the marijuana and other evidence. *Id.* at 536.

This Court concluded in *Murray* that the search conducted pursuant to the warrant could be a "genuinely independent source" from the earlier illegal entry if the information obtained from the illegal entry was not used to obtain the warrant and did not affect the decision of the agents to seek a warrant. *Id.* at 542. This Court accordingly remanded for determination of that question. *Id.* at 543-544; *see also Segura v. United States*, 468 U.S. 796, 813-815 (1984) (holding that earlier illegal entry into apartment did not affect admissibility of evidence police found during later search authorized by untainted warrant).

Both *Murray* and *Segura* thus stand for the proposition that a *second* lawful entry can be a source independent from an earlier illegal entry if that second entry is "genuinely independent" from the earlier entry. As discussed in the next subsection, *Murray* and *Segura* lend no support to the notion that a *single* unlawful entry can be its own independent source.

2. Since There Is No Independent Source When Officers Immediately Enter and Seize Evidence After Violating the Knock and Announce Requirement, the Inevitable Discovery Doctrine Is Inapplicable.

The inevitable discovery doctrine, as set forth in *Nix* and explained in *Murray*, is quite clear. The doctrine is simply an extension of the independent source doctrine that applies when the tainted police activity actually leads to the discovery of the evidence but when there is also an independent untainted source that would have also produced the evidence. *Murray*, 487 U.S. at 539; *Nix*, 467 U.S. at 443-444.

The obvious problem, then, with the Michigan Supreme Court's *per se* application of the inevitable discovery doctrine to knock and announce violations is the complete absence of an independent source. In *Nix*, search parties that were nearing the body were wholly independent of the illegal questioning of Williams. In *Murray* and *Segura*, there were legal entries and searches that were, or were claimed to be, genuinely independent of the illegal entries that had occurred hours earlier. But in Petitioner's case, there was only one police action, a concededly illegal entry followed immediately by a search and seizure. There was

no other independent process of any kind that would have lawfully produced the evidence found in Petitioner's home.

The Michigan Supreme Court held in *Stevens*, however, that there is always an independent source for the discovery of the evidence:

> It was not the means of entry that led to the discovery of the evidence, but, rather, it was the authority of the search warrant that enabled the police to search and seize the contested evidence. Therefore, the searching and seizing of the evidence was independent of failure to comply with the "knock and announce" statute.

597 N.W.2d at 64. In reality, then, *Stevens* relied on the independent source doctrine, not inevitable discovery, to justify a *per se* rule of admissibility. According to the Michigan Supreme Court, the evidence found inside a home flows from the authority the police have to enter and search that home, not from the entry of the home, and the entry and the authority are independent of each other.

The most obvious response to this argument is that it is flatly contrary to the raft of precedent discussed in Part A, *supra*, holding that an illegal entry renders unreasonable a search conducted inside *following that entry* even if the entry was, or could have been, authorized with a warrant. The Michigan Supreme Court ignored that precedent, arbitrarily declared the entry to be independent of the authority for the entry, and thus contravened the requirement of *Nix*, *Murray*, and *Segura* that there be a genuinely independent source of the evidence.

In addition, the reasoning in *Stevens* directly contradicts *Miller* and *Sabbath*. In both *Miller* and *Sabbath*, the lawful authority of the officers to enter the defendants'

homes to arrest them was conceded or assumed. *See Miller*, 357 U.S. at 305-306 & n.4 (discussing local law authorizing officers to enter without warrant to arrest upon probable cause); *Sabbath*, 391 U.S. at 588 (holding that § 3109 governs "an entry of a federal officer to effect an arrest without a warrant").[2] By the time *Miller* and *Sabbath* were decided, this Court had long applied the independent source doctrine. *See, e.g.*, *Silverthorne Lumber*, 251 U.S. at 392 ("If knowledge of [facts obtained by illegal means] is gained from an independent source they may be proved like any others"). Thus, if *Stevens* were correct, the fact that the officers in *Miller* and *Sabbath* had probable cause to arrest (and therefore lawful authority to enter) would have been an independent source for the evidence seized inside the homes. As discussed in Part A, *supra*, however, this Court in *Miller* and *Sabbath* most certainly did not view the search and seizure of the evidence inside the home as somehow independent from the knock and announce violation. Nor, for that matter, did the Court in *Wilson* view the entry and search as divorced from a knock and announce violation.

Indeed, eight members of this Court in *Ker v. California*, 374 U.S. 23 (1963), explicitly rejected a claim that the method of entering a home is independent from the search and seizure inside. As the plurality in *Ker* explained, "notwithstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the

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[2] Of course, this Court later held in *Payton v. New York*, 445 U.S. 573 (1980), that probable cause to arrest is insufficient to justify a warrantless entry into a home in the absence of an exigency, but *Miller* and *Sabbath* predated *Payton*.

legality of an accompanying search." *Id.* at 38. The four dissenters in *Ker* put it even more plainly: "This Court settled in *Gouled v. United States*, 255 U.S. 298, 305-306 (1921), that a lawful entry is the indispensable predicate of a reasonable search." *Id.* at 53 (Brennan, J., dissenting).

The Michigan Supreme Court artificially and arbitrarily treated the authority to perform an entry as an independent source from the actual entry performed under that authority. This atomistic approach stretches beyond reason the independent source doctrine and, by extension, the inevitable discovery doctrine. As the Sixth Circuit explained in rejecting a similar argument based on *Murray* and *Segura*:

> The cases on which the Government relies are distinguishable from this case because they all involved a *second search* pursuant to a valid warrant, and that second search was independent of the illegal initial search. . . . In this case, there was but one entry, and it was illegal. The officers seized the evidence in question directly following that illegal entry. Knock-and-announce caselaw in this circuit and others makes very clear that such evidence is inadmissible as the direct fruit of that search.

Dice, 200 F.3d at 985 (emphasis in original); *see also Marts*, 986 F.2d at 1220 ("[In *Segura*], the illegal entry was not related to the evidence later seized. . . . In the present case, the officers seized the evidence immediately upon their illegal entry.").

As this Court has long recognized, the seizure of evidence in a home is the fruit of both the authority for the entry and the entry itself. If either the authority for the

entry or the entry itself is illegal, the evidence seized inside is suppressible fruit of the illegality.

Although Petitioner rejects the Michigan Supreme Court's *per se* rule of admissibility, he does not contend that the inevitable discovery doctrine is never applicable to a knock and announce violation. Petitioner agrees that evidence seized after a knock and announce violation should be admitted if the prosecution establishes that the evidence was, or inevitably would have been, found through a genuinely independent source. For example, if an officer forced open a defendant's front door without complying with the knock and announce requirement, evidence seized inside would be admissible under the independent source doctrine if the prosecution could show that the evidence was actually found by another officer who did knock and announce at the back door. Alternatively, if the officer who came through the front door found the evidence, the evidence would be admissible under the inevitable discovery doctrine if the prosecution could show that the officer who did knock and announce at the back door would have found it if the other officer had not found it first. Evidence may also be admissible despite a knock and announce violation in a case such as *United States v. Moreno*, 758 F.2d 425 (9th Cir. 1985), where officers violated the requirement in entering the alcove of an apartment, where they found no evidence, but then properly knocked and announced before entering the interior of the apartment, where they did find the evidence.[3] Finally,

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[3] Evidence also might be admissible if officers commit a violation in the home that neither renders the entry illegal nor leads to discovery of the evidence. *See Ramirez*, 523 U.S. at 71 (suggesting in dicta that "[e]xcessive or unnecessary destruction of property in the course of a

(Continued on following page)

the evidence presumably would be admissible despite a knock and announce violation if it were found *outside* the home. *See Harris*, 495 U.S. at 21 (holding admissible evidence procured outside home after illegal warrantless entry).

By contrast, there is no independent source or process of any kind in Petitioner's case, where the police violated the knock and announce rule, barged into the home, and immediately seized the evidence. Exactly as in *Miller* and *Sabbath*, the seizure of the evidence inside Petitioner's home flowed directly and immediately from the illegal entry.

Since there is no independent process or source for the seizure of the evidence in such a case, there is also no inevitable discovery. *Murray*, 487 U.S. at 539. The clear majority of courts have correctly rejected arguments that the inevitable discovery doctrine erects a *per se* rule of admissibility for evidence found in a home after a knock and announce violation.

3. The Michigan Supreme Court Distorted the Inevitable Discovery Doctrine by Interpreting the "Worse Position" Language in *Nix* To Require the Admission of Any Evidence the Police *Could Have* Obtained Lawfully.

Despite the absence of any genuinely independent source of the evidence, the Michigan Supreme Court concluded in *Stevens* that the inevitable discovery doctrine

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search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression").

applied because "excluding the evidence puts the prosecution in a worse position than it would have been had there been no police misconduct." 597 N.W.2d at 62. The *Stevens* court derived this language from *Nix*, where this Court observed that "suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct." 467 U.S. at 447 (emphasis in original). Therefore, the Michigan Supreme Court reasoned, since the police presumably would have found the same evidence in the home if they had knocked and announced, exclusion would put the prosecution in a "worse position" than it would have enjoyed had the police knocked and announced. *Stevens*, 597 N.W.2d at 64.

The Michigan Supreme Court's reasoning is based on a fundamental misreading of *Nix*. If the understanding of the inevitable discovery rule set forth in *Stevens* were correct, the inevitable discovery doctrine would devour most of the exclusionary rule.

The most basic problem with the *Stevens* version of inevitable discovery is that it turns on what would have happened if the police had performed the tainted search or seizure *properly* instead of what would have happened if the police had *refrained* from the tainted activity. The Fourth Circuit has observed that the former approach, which it dubbed "if we hadn't done it wrong, we would have done it right," would swallow the exclusionary rule because the police would "profit from their own wrongdoing." *United States v. Thomas*, 955 F.2d 207, 209-210 (4th Cir. 1992). That is, an officer would have no incentive to avoid "doing it wrong" because she would know that the court would admit the evidence just as if she had "done it right." *See also United States v. Boatwright*, 822 F.2d 862,

865 (9th Cir. 1987) (observing that unless independent search was underway or would occur as matter of routine procedure, applying inevitable discovery doctrine would "permit the government to ignore search requirements at any convenient point in the investigation, and would go well beyond the present scope of the doctrine").

The correct approach under both the inevitable discovery and independent source doctrines is to ask what inevitably would have happened if the police had refrained from the tainted activity. In *Nix*, for example, this Court concluded that search parties inevitably would have found the body if the detective had refrained from eliciting information from Williams. The Court found in *Segura* and the Government claimed in *Murray* that the police still would have found the evidence during the second lawful entry even if they had refrained from the initial illegal entry.

It is inherent in the nature of the exclusionary rule itself that the prosecution may be placed in a "worse position" than it would have been in had the government conducted itself within constitutional limits. Thus, Justice Holmes, writing for a unanimous Court in *Silverthorne Lumber*, rejected the Government's argument that corporate papers seized through an illegal search should nonetheless be admitted because they could have been subpoenaed: "[T]he rights of a corporation against unlawful search and seizure are to be protected *even if the same result might have been achieved in a lawful way*." 251 U.S. at 392 (emphasis added).

Under the Michigan Supreme Court's approach, the documents in *Silverthorne Lumber* should be regarded as "inevitably discovered" because the Government *could*

have obtained them in a lawful way. The correct analysis, after *Nix*, *Murray*, and *Segura*, is to ask whether the Government in *Silverthorne Lumber* inevitably *would have* obtained the documents by subpoena if it had refrained from the illegal entry and search that actually produced them.

If the Michigan Supreme Court is correct that the prosecution should be placed in the position that it would have enjoyed had the police acted constitutionally, then this Court has wrongly decided every criminal case, beginning with *Silverthorne Lumber*, in which evidence was excluded when the government had a lawful route to obtain the same evidence it unlawfully obtained. For example, in *Katz v. United States*, 389 U.S. 347, 354 (1967), this Court observed, "it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate . . . could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." Nevertheless, the Court suppressed the evidence in *Katz* because the agents did not choose the constitutional path but instead acted without seeking a magistrate's authorization. That is, the prosecution in *Katz* was placed in a "worse position" than it would have enjoyed had the police acted lawfully, but it was placed in exactly the same position that it would have been in had the police not engaged in the tainted activity at all. *See also Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001) ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment."); *Knowles v. Iowa*, 525 U.S. 113, 115-118 (1998) (suppressing evidence found during vehicle search "incident to citation" because motorist was

not arrested even though Iowa law authorized officer to arrest motorist for traffic offense); *Thompson v. Louisiana*, 469 U.S. 17, 22 (1984) (suppressing evidence seized from home after exigency had ended even though officers could have seized evidence "under the plain-view doctrine while they were in petitioner's house to offer her assistance"); *United States v. Place*, 462 U.S. 696, 709 (1983) (suppressing evidence obtained from unreasonably prolonged *Terry* stop after noting that agents "knew the time of Place's scheduled arrival at LaGuardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests"); *Florida v. Royer*, 460 U.S. 491, 504-507 (1983) (plurality opinion) (suppressing evidence seized after excessively intrusive *Terry* stop and noting that less intrusive means to obtain evidence were available); *Coolidge v. New Hampshire*, 403 U.S. 443, 450-451 (1971) (suppressing evidence found pursuant to warrant issued by prosecuting official and treating as irrelevant claim by State "that any magistrate, confronted with the showing of probable cause made by the Manchester chief of police, would have issued the warrant in question"); *Mancusi v. DeForte*, 392 U.S. 364, 372 n.12 (1968) ("It is, of course, immaterial that the State might have been able to obtain the same papers by means which did not violate the Fourth Amendment."); *cf. Sgro v. United States*, 287 U.S. 206, 211-212 (1932) (suppressing evidence seized by officers acting with expired search warrant without considering whether same evidence would have been found if officers had executed warrant earlier).

These cases demonstrate that the Michigan Supreme Court's reading of the "worse position" language in *Nix*

would work a radical change to the exclusionary rule. Instead of requiring the prosecution to prove, as it did in *Nix*, that the evidence *inevitably would have* been lawfully discovered without the violation through the operation of an independent source, the Michigan Supreme Court's approach would admit the evidence so long as the police *could have* behaved lawfully and obtained the evidence in the absence of any independent source at all.

Under the Michigan Supreme Court's approach, the police would have a clear incentive to behave unlawfully so long as they know they *could* obtain the evidence by behaving lawfully. In other words, the police would have every reason to take unconstitutional shortcuts because they would know that the evidence would come in anyway. Thus, for example, an Iowa police officer would know that she could unconstitutionally search a motorist's vehicle "incident to citation," despite the holding in *Knowles*, because the court would hold that suppression would put the prosecution in a "worse position" than it would have been in had the officer first arrested the motorist and then searched the vehicle.

The Michigan Supreme Court's version of inevitable discovery would effectively gut the warrant requirement for any case in which the police have probable cause to obtain a warrant or an alternative method of obtaining the evidence. In any case such as *Katz* and *Coolidge* where the police have ample probable cause to obtain a warrant, they would not bother to get one because the court would invariably hold that suppression would put the prosecution in a "worse position" than it would have been in had the police obtained a warrant. In cases such as *Silverthorne Lumber*, where the police could lawfully obtain the evidence through more onerous or time-consuming means,

the police would simply obtain it illegally, secure in the knowledge that the court would refuse to put the prosecution in a "worse position" than it would have been in had the police used the lawful method to obtain the evidence.

The Michigan Supreme Court has, so far, only applied its unique reading of *Nix* to the knock and announce rule. That reading of *Nix* has resulted in a *per se* rule of inevitable discovery that "would completely emasculate the knock-and-announce rule." *Dice*, 200 F.3d at 986. *See also Marts*, 986 F.2d at 1220 (concluding *per se* inevitable discovery argument would mean "officers, in executing a valid search warrant, could break in doors of private homes without sanction"); *Mazepink*, 987 S.W.2d at 657-658 ("[E]xclusion of the evidence is the appropriate remedy. . . . [W]ere we to hold otherwise, the 'knock and announce' rule would be rendered meaningless."). As discussed in the next subsection, there is no incentive other than suppression that could possibly motivate the police to comply with a requirement that a typical police officer is likely to view as a hindrance to the search and a threat to his own safety. *See* J.A. 20 (Officer Good explaining his decision to immediately enter Petitioner's home as a "safety factor" since he had "been shot at numerous times going into drug houses").

In sum, the Michigan Supreme Court has misinterpreted the "worse position" language from *Nix*. In *Nix*, the prosecution would have unjustifiably been placed in a "worse position" if the body had been suppressed even though it was about to be discovered by lawful means independent of the illegality. Therefore, the Court put the prosecution in the position it would have enjoyed had the police refrained from the illegal activity. *Nix* gave absolutely no indication that it meant to overturn the many

cases in which the Court had suppressed evidence and placed the prosecution in a "worse position" than it would have been in had the police used lawful means to obtain the evidence. *Nix*, then, must be read in context to apply to those situations in which the evidence *inevitably would have* been found through lawful independent means, not as a license for courts to construct hypothetical alternative realities in which the police decide to act lawfully instead of illegally.

When *Nix* is read properly, the outcome here is clear. The police unconstitutionally forced their way into Petitioner's home without knocking and without giving Petitioner any reasonable amount of time to come to his door. Immediately after violating the knock and announce requirement, the police barged in and found the evidence inside Petitioner's home. There was no independent untainted process of any kind by which the police would have found the evidence in Petitioner's home. Therefore, the evidence found following the knock and announce violation should have been suppressed, just as this Court suppressed such evidence in *Miller* and *Sabbath*.

4. Remedies Other Than Exclusion Will Not Deter Police Officers from Committing Knock and Announce Violations.

The purpose of the exclusionary rule is "to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960); *see also Weeks v. United States*, 232 U.S. 383, 393 (1914) (concluding that without the exclusionary sanction, the Fourth Amendment "might as well be stricken from the Constitution"). As this Court explained in *Nix*, the

inevitable discovery doctrine does not undermine the deterrence rationale of the exclusionary rule because "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." 467 U.S. at 445.

By contrast, police officers operating under the *per se* rule announced by the Michigan Supreme Court do not have to perform any calculations at all. They know to a certainty that a reviewing court will *always* regard the evidence they find after a knock and announce violation to be "inevitably discovered," so they know that violating the knock and announce rule will *never* result in exclusion. Therefore, even if the inevitable discovery doctrine actually were applicable when there are no independent and untainted means of discovering the evidence, the *per se* application of the doctrine to knock and announce violations would still be inappropriate because it would destroy the deterrence rationale of the exclusionary rule.

The Michigan Supreme Court has concluded, however, that exclusion is not necessary to deter the police from violating the knock and announce rule because there are other effective deterrents. The Michigan Supreme Court identified the possibility of a federal lawsuit under 42 U.S.C. § 1983 and also pointed to a state statute that declares that an officer executing a search warrant is guilty of a misdemeanor if he "willfully exceeds his authority or exercises it with unnecessary severity." *Stevens*, 597 N.W.2d at 61 (quoting Mich. Comp. Laws § 780.657).

The Michigan Supreme Court's reliance on the threat of criminal liability to deter knock and announce violations can be disposed of quickly. More than forty years ago,

this Court found that state statutes imposing criminal liability on officers, like other remedies, had proven to be "worthless and futile" in protecting citizens' Fourth Amendment rights. *Mapp v. Ohio*, 367 U.S. 643, 651-652 & n.7 (1961). Indeed, Mich. Comp. Laws § 780.657, the statute that the Michigan Supreme Court cited in *Stevens*, proves the point from *Mapp*. Even though this statute was enacted in 1948, there does not appear to be a single case, reported or unreported, of any Michigan police officer ever having been prosecuted under the statute, much less an officer prosecuted for a knock and announce violation. *See also Stevens*, 597 N.W.2d at 66 n.6 (Cavanagh, J., dissenting) (noting that prosecutor for Michigan's largest county had conceded at oral argument that he was not aware of any prosecutions brought by his office under the statute). The entirely hypothetical "threat" of criminal prosecution remains as "worthless and futile" a method of enforcing the Fourth Amendment today as it was when *Mapp* was decided.

The Michigan Supreme Court's reliance on the possibility of tort liability as an effective deterrent for knock and announce violations also does not survive scrutiny. The reliance on tort liability to deter Fourth Amendment violations, like the reliance on the possibility of criminal prosecution, is inconsistent with *Mapp*, in which this Court recognized the "obvious futility of relegating the Fourth Amendment [to] the protection of other remedies." 367 U.S. at 652.

Mapp extended to the states the holding of *Weeks* that Fourth Amendment violations are subject to the exclusionary rule. *Id.* at 655. There is no support in *Weeks*, *Mapp*, or any of this Court's other cases for the proposition that courts should feel free to remove certain types of

Fourth Amendment violations from the exclusionary rule upon finding that the threat of tort liability is sufficient to deter the police from committing that particular type of violation.

Even if courts were free to carve out such categorical exceptions from the exclusionary rule, the knock and announce requirement would be one of the worst candidates for such treatment because violations of that requirement are far less likely to result in tort liability than most other Fourth Amendment violations. In fact, Petitioner has not been able to locate a single decision, reported or unreported, from anywhere in the United States upholding a verdict awarding actual damages for a knock and announce violation.[4] Even if there have been cases in which plaintiffs have recovered actual damages for knock and announce violations, those cases must be so exceedingly rare as to have essentially no deterrent effect on the conduct of police officers.

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[4] Petitioner has found one unreported trial court case, *Buss v. Quigg*, No. 01-CV-3908, 2002 WL 31262060 (E.D. Pa. Oct. 9, 2002), in which the plaintiffs apparently collected nominal damages of $1 each for a knock and announce violation. Respondent cites three cases – *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *Kornegay v. Cottingham*, 120 F.3d 392 (3d Cir. 1997), and *Aponte Matos v. Toledo Davila*, 135 F.3d 182 (1st Cir. 1998) – in support of the proposition that "civil suits can and are brought in these situations." Br. Opp. Pet. at 11. The plaintiffs in *Ayeni* claimed that the officers were liable for bringing along the media, not for a knock and announce violation. 35 F.3d at 683. In *Kornegay*, the court allowed a knock and announce claim to proceed but took pains to "not suggest that these officers ought to be liable under section 1983." 120 F.3d at 399 n.5. There is no indication that the officers were held liable on remand. Finally, in *Aponte Matos* the court *granted* qualified immunity to the officers. 135 F.3d at 190-191.

The knock and announce rule embodies "the reverence of the law for the individual's right of privacy in his house." *Miller*, 357 U.S. at 313. The rule protects that privacy by seeking to "avoid 'the destruction or breaking of any house . . . by which great damage and inconvenience might ensue.'" *Wilson*, 514 U.S. at 935-936 (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng.Rep. 194, 196 (K.B. 1603)) (omission in original). In addition, the rule protects the dignity of residents by giving them an opportunity "to prepare themselves for such an entry" by, for example, "pull[ing] on clothes or get[ting] out of bed." *Richards*, 520 U.S. at 393 n.5; *see also Ker*, 374 U.S. at 57 (Brennan J., dissenting) ("Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion.").

As this Court has recognized, such privacy interests are a core part of the Fourth Amendment right of the people to be secure in their houses, but such interests are singularly difficult to enforce through tort liability, especially when the police do not destroy property. *Cf. Sabbath*, 391 U.S. at 589-590 (holding that rule protects against unannounced entries even if police do not break door). Even if the police do destroy the door, it is extremely doubtful that the cost of replacing the door would be worth a lawsuit.

Petitioner's case proves the point. The police apparently did not destroy his door, but they certainly did destroy his right to be secure in his home when seven armed police officers, including a "shotgun man," burst through his door so quickly that he did not have an opportunity to arise from his chair in the front room. J.A. 17-20. While such an entry would frighten and embarrass any resident, it would be highly unrealistic to expect that a

lawsuit could possibly result in anything more than nominal damages. Therefore, most victims of knock and announce violations will not file a lawsuit at all.

Only in an extreme case, such as *Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005) (*en banc*), might a victim of a knock and announce violation have a colorable claim for significant damages, but as *Doran* illustrates, recovery still is highly unlikely. A jury awarded the plaintiff in *Doran* $2,000,000 upon finding that he had been shot as the direct result of a knock and announce violation, but the Eighth Circuit reversed the judgment on the ground that the no-knock entry was justified by the circumstances. *Id.* at 960, 963-967; *see also Leaf v. Shelnutt*, 400 F.3d 1070, 1082-1085 (7th Cir. 2005) (reversing denial of summary judgment to officer who entered and shot resident without knocking and announcing).

Even if there are damages worth litigating and even if a court actually agrees that there was a knock and announce violation, other legal barriers will generally prevent the victims of the violation from ever recovering damages. In a § 1983 action, the officers who committed the violation will enjoy qualified immunity from damages so long as any reasonable officer could disagree as to whether the no-knock entry was justified. *See, e.g., Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d 293, 305 (5th Cir. 2004) (granting qualified immunity to officer for alleged knock and announce violation because not all reasonable officers would have concluded entry was illegal). In a state tort action, governmental immunity statutes will typically protect the officers from liability. *See, e.g.*, Mich. Comp. Laws § 691.1407(2)(c) (providing that officers are liable in tort only for "conduct so reckless as to demonstrate a substantial lack of concern for

whether an injury results"); *Thomas v. Pontiac Police Officers*, No. 203002, 1999 WL 33446475, at *2 (Mich. Ct. App. Apr. 27, 1999) (affirming summary judgment to officers because "[a]ssuming, arguendo, that defendants did not comply with the knock-and-announce statute, plaintiff offers no evidence that defendants' conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results") (footnote omitted).

This Court recognized in *Mapp* that remedies other than exclusion were worthless in deterring police from committing Fourth Amendment violations. The Michigan Supreme Court was wrong to reach a contrary conclusion, and it was especially wrong to reach that contrary conclusion for knock and announce violations since other remedies have proven to be completely ineffective in enforcing that particular constitutional guarantee.

Finally, the *per se* application of the inevitable discovery doctrine to the knock and announce rule would effectively make the rule a dead letter because courts in criminal cases would no longer decide whether the police violated the rule. This has already happened in Michigan, where the courts no longer have any reason to decide whether the police violated the knock and announce rule. *See Vasquez*, 602 N.W.2d at 378 (declining to decide, in light of *Stevens*, whether police violated knock and announce rule); *see also United States v. Brown*, 333 F.3d 850, 853 (7th Cir. 2003) (avoiding decision on whether knock and announce violation occurred because "Brown's argument is cut short by this court's recent decision in *United States v. Langford*"), *cert. denied*, 540 U.S. 1163 (2004).

At present, officers in Michigan are not only undeterred from committing knock and announce violations, they are no longer even *informed* by the courts when they do commit such a violation. If this Court were to adopt the position of the Michigan Supreme Court, criminal defendants nationwide will simply stop moving to suppress evidence obtained after knock and announce violations, and the rule itself would become purely hortatory. The courts would no longer have any reason to decide whether the police have violated the rule (except in the rare civil case, and only then if there were no immunity or other barrier to recovery), and the development of the law in this area would effectively come to a halt.[5]

It is worth noting in this regard that all four of this Court's Fourth Amendment knock and announce decisions (*Wilson*, *Richards*, *Ramirez*, and *Banks*) came in *criminal* cases in which the defendants hoped to suppress the evidence seized from their homes. If the Michigan Supreme Court's approach is correct, this Court should never have reached the substantive constitutional questions presented in any of those four cases. Instead, this Court should have simply ruled, as the Michigan Supreme Court did in *Vasquez*, that the defendants could not obtain the

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[5] In this respect, the *per se* rule of *Stevens* is unlike the good faith exception announced in *United States v. Leon*, 468 U.S. 897 (1984). As the Court recognized in *Leon*, defendants still have an incentive to file motions to suppress evidence seized pursuant to warrants lacking probable cause because such motions will still be granted if the warrant is so lacking in probable cause that a reasonable officer should not have relied on it. *Id.* at 924 n.25. By contrast, there is currently no reason for a criminal defendant in Michigan to file a motion to suppress evidence seized after a knock and announce violation.

relief they were seeking even if the police did commit knock and announce violations.

If this Court were to hold that evidence found after a knock and announce violation is always to be regarded as inevitably discovered, the rule "might as well be stricken from the Constitution." *Weeks*, 232 U.S. at 393. Such a holding would make irrelevant a core part of the right of the people to be secure in their houses from unreasonable searches and seizures and, at the same time, work a radical change to the inevitable discovery doctrine that would put many other constitutional protections at risk.

Therefore, Petitioner respectfully requests that this Court reaffirm *Miller* and *Sabbath* and hold that the evidence seized from him is the suppressible fruit of the illegal entry into his home.

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed, and the case should be remanded to that court with instructions to reverse Petitioner's conviction.

Respectfully submitted,

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In The
Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

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QUESTION PRESENTED

I.

A causal relationship between improper police conduct and the discovery of evidence is indispensable – though not necessarily sufficient – to a determination that exclusion is appropriate. Contraband discovered during a search of proper scope under a valid warrant, but after a police error in carrying out principles of announcement, is the fruit of the judicially authorized invasion of privacy, not the improper manner of entry. Does the Fourth Amendment require the exclusion of evidence because of a violation of principles of announcement despite a lack of causal connection between any police error and the discovery of the contraband?

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STATEMENT OF THE CASE

At 3:35 in the afternoon of August 27, 1998, Detroit police officers executed a search warrant for narcotics and weapons at a residence in Detroit. J.A. 4-5. The first officer to the door, the "shotgun man," J.A. 17, testified that the officers yelled "police, search warrant" as they approached the premises. J.A. 19. It took "maybe three to five seconds" before the premises were entered; this occurred "real fast." J.A. 19. The officer did not wait for someone to answer the door, Pet. App. 9, nor did he hear anything inside the premises before entering. Pet. App. 8. The "shotgun man" officer entered by simply opening the door and going inside. J.A. 19. This officer had been shot at previously in the execution of search warrants. J.A. 20.

Petitioner was discovered to have five rocks of crack cocaine in his pocket when searched by this same officer. Pet. App. 7. At this time petitioner was in custody, as individually wrapped rocks of crack cocaine in a plastic bag had been discovered in the chair where he had been sitting.[1] He was convicted for possession based on the cocaine found on his person.

Before trial, an evidentiary hearing was held on petitioner's claim that the officers executing the warrant had failed to wait a reasonable period after announcing their presence and purpose. Pet. App. 6; J.A. 9. Though the

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[1] Though not germane to petitioner's Fourth Amendment claim and thus not explored by petitioner at the motion to suppress, simply for purposes of clarification it should be noted that after the entry was made petitioner was directed to stand, contraband was found where he had been sitting, and he was arrested. The rocks of crack cocaine for which he was convicted were found on his person in a search after that arrest, as revealed at trial. Trial Transcript I, 11-12, 16, 26, 34.

Michigan Supreme Court had held that exclusion is not permitted for this sort of violation, the trial judge suppressed and dismissed nonetheless. The Michigan Court of Appeals peremptorily reversed this decision, Pet. App. 4, and the Michigan Supreme Court denied leave to appeal. Pet. App. 5. Petitioner was then convicted at a bench trial. J.A. 21-22. That conviction was affirmed by the Michigan Court of Appeals, the announcement issue rejected on the ground that the prior order of that court was the law of the case. Pet. App. 1-2. Leave to appeal was denied by the Michigan Supreme Court. Pet. App. 3. This Court then granted petitioner's petition for certiorari.

SUMMARY OF ARGUMENT

The purpose of the exclusionary rule, which is itself not constitutionally mandated, is to serve as a deterrent sanction, inhibiting violation of the Fourth Amendment by depriving the government of the fruits of a violation. The exclusionary rule is not remedial, and it is not a personal right of the defendant.

Even where there are "fruits" of the improper action of the police, the exclusionary rule is not applied unthinkingly. Rather, in a number of circumstances, despite "but-for" causation – where the evidence or contraband discovered flows as an effect from a cause – exclusion is not mandated. Purged taint, attenuation, standing, inevitable discovery, and several other doctrines demonstrate that but-for causation is not always sufficient to require the sanction of suppression. That said, but-for causation is necessary to the sanction of suppression; in its absence, suppression is not ordered, as if there are no fruits of the

police error – if the evidence or contraband is not come by through "exploitation" of the "primary illegality" – exclusion is not justified under this Court's precedents.

Where the police execute a properly obtained search warrant and discover evidence or contraband in a search of proper scope and intensity, the evidence or contraband discovered is the fruit of the execution of that judicial command. When the police err in carrying out principles of announcement, either by failing to announce, or, as here, by announcing but failing to wait a sufficient period, the nonconsensual entry can have no "fruit" with regard to any evidence or contraband discovered, as there is a causal disconnect between the error of the police and that which is discovered in the search. Only if announcement is meant to give those inside a reasonable opportunity to hide or destroy the evidence, or injure the officers, can the evidence discovered be said to be anything other than the fruit of the search of proper scope under the valid warrant. The entry is unreasonable under the Fourth Amendment, but whatever fruit it has, be it a broken door, or, in an unfortunate case, unnecessary injury to persons (none of which occurred in the present case), that fruit does not include the evidence or contraband found in the search, and may be redressed by other means, if needs be. That an error in announcement in the execution of a warrant violates the Fourth Amendment does not invalidate the search in total; indeed, precedent from this Court as well as other courts in analogous circumstances demonstrates that if the evidence is not come at by exploitation of the primary illegality, here the failure to wait long enough after announcing – if the evidence is not, then, causally connected to that illegality, as an effect from a cause – exclusion is inappropriate. So here.

ARGUMENT

I. The Fourth Amendment does not require the exclusion of evidence because of a violation of principles of announcement because there is no causal connection between any police error and the discovery of the evidence.

> *"The . . . exclusionary sanction [is] . . . a carefully controlled scalpel rather than . . . an indiscriminate blunderbuss. . . ."*[2]

A. Introduction

In *Wilson v. Arkansas*[3] this Court declined to reach the question of whether an exclusionary sanction is appropriate for a violation of announcement principles, that issue not then properly before the Court:

> Respondent and its *amici* also ask us to affirm the denial of petitioner's suppression motion on an alternative ground: that exclusion is not a constitutionally compelled remedy where the unreasonableness of a search stems from the failure of announcement. . . . [R]espondent and its *amici* argue that any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation. Because this remedial issue was not addressed by the court below and is not within the narrow question on which we granted

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[2] *State v. Klingenstein*, 608 A.2d 792, 800 (Md. App., 1992) (Moylan, J.) (aff'd in part, rev'd in part on other grounds, *Klingenstein v. State*, 330 Md. 402, 624 A.2d 532 (Md., 1993)).

[3] *Wilson v. Arkansas*, 514 U.S. 927, 937 (1995).

certiorari, we decline to address these arguments.

The Michigan Supreme Court has held that exclusion is inappropriate in this circumstance,[4] a position also taken by the United States Court of Appeals for the Seventh Circuit.[5] In asking this Court to reach a contrary conclusion, petitioner in effect requests this Court to cut the application of the exclusionary rule loose from its doctrinal moorings,[6] and creates a straw-man "inevitable discovery" opponent which he then attacks. But the issue here is causation not inevitable discovery; this Court has never found application of the Fourth Amendment exclusionary rule appropriate where there is no but-for causal relationship between the police error involved and the seizure of evidence. It should not do so here. This Court should reject petitioner's invitation to apply the exclusionary rule as an indiscriminate blunderbuss rather than a carefully controlled scalpel. That it should do so is counseled by the Court's own precedents concerning the nature and purpose of the rule, as well as concerning its application, and also the lack of exclusion in analogous situations.

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[4] *People v. Stevens*, 460 Mich. 626, 631, *cert. den.*, 528 U.S. 1164 (2000).

[5] See *United States v. Espinoza*, 256 F.3d 718, 726 (CA 7, 2001); *United States v. Langford*, 314 F.3d 892, 894 (CA 7, 2002); *United States v. Jones*, 149 F.3d 715, 716-17 (CA 7, 1998).

[6] As several courts have done, see, e.g., *State v. Lee*, 374 Md. 275, 821 A.2d 922 (Md., 2003); *United States v. Dice*, 200 F.3d 978 (CA 6, 2000).

B. The Exclusionary Rule: Its Origins, Purpose, and Limits

(1) Origins and Purpose

It cannot be gainsaid that *the* purpose of the exclusionary rule is to deter improper police conduct by denying the Government of the fruit of that conduct; thus, Respondent will not labor long to illustrate that point. While the Fourth Amendment itself has roots in such cases as *Wilkes v. Wood*,[7] *Entick v. Carrington*,[8] and *Semayne's Case*,[9] none of these cases resulted in the exclusion of evidence from a criminal proceeding, being rather, for the most part, civil cases to recover damages. Not until almost 100 years after the adoption of the Fourth Amendment did the notion of exclusion of evidence for its violation appear in our jurisprudence, in the case of *Boyd v. United States*.[10] Indeed, the contrary of the proposition that evidence should be excluded from trial based on the manner of its acquisition was well-established by the time of the *Boyd* decision. Professor Greenleaf listed among those doctrines of evidence which were "common to all the United States" that:

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[7] *Wilkes v. Wood*, 19 Howell's State Trials 1153 (1763).

[8] *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765) (upholding a verdict for trespass against the officers executing a general warrant).

[9] *Semayne's Case*, 77 Eng. Rep. 194, 195 (1603) (specifically concerning forcible entries into dwellings, and stating that "in all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors. . . .").

[10] *Boyd v. United States*, 116 U.S. 616 (1886).

> . . . though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine the question.[11]

And in *United States v. La Jeune*[12] Justice Story, sitting as circuit justice, rejected an argument that evidence should not be admitted because unlawfully seized, remarking that " . . . the law deliberates not on the mode, by which [evidence] has come to the possession of the party, but on its value in establishing itself as satisfactory proof." This opinion, along with that of Justice Wilde of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Dana*[13] that

> [i]f the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers as evidence, if they were pertinent to the issue. . . . [T]he court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question,

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[11] 1 Greenleaf, *A Treatise on the Law of Evidence* (14th ed., 1884), § 254a, p.325-326.

[12] *United States v. La Jeune*, 26 F. Case 832, 842 (CCD Mass., 1822) (No 15,551).

[13] *Commonwealth v. Dana*, 43 Mass. 329, 337 (1841).

were "invoked as authority for like decisions in other state courts" and "relied on by federal courts to justify the admission of books and papers into evidence, regardless of the legality of their seizure."[14] Case reports from almost the first 100 years of the existence of the Fourth Amendment reveal a number of actions alleging a wrongful search or seizure, with "traditional common-law forms of action associated with trespass . . . without exception, the modes of redress invoked."[15] The Fourth Amendment was not ignored; rather, "the requirements of due process and of nonarbitrary searches and seizures lived in harmony in the thought of the Founders. In that same jurisprudence, however, the exclusionary rule has no life at all."[16] And then came *Boyd*, for the first time excluding evidence obtained as the result of the manner of its acquisition.[17]

Boyd's Fifth Amendment/Fourth Amendment amalgam rationale for exclusion of evidence no longer obtains. Indeed, 18 years later this Court in *Adams v. New York*[18] rejected a challenge to evidence seized under a search warrant by simply declaring that courts will not inquire into the means by which evidence otherwise admissible was acquired, distinguishing *Boyd* on its Fifth Amendment rationale by limiting it to situations where a "positive act"

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[14] Bradford P. Wilson, "The Fourth Amendment as More Than a Form of Words: The View from the Founding," in Hickok, editor, *The Bill of Rights* (University Press of Virginia, 1991), p. 151, 169.

[15] Wilson, at 165.

[16] Wilson, at 169.

[17] As Dean Wigmore said, the doctrine that evidence could not be excluded because of the manner of its acquisition "was never doubted until the appearance of the ill-starred majority opinion of *Boyd v. United States*. . . ." 4 Wigmore, *Evidence* (2d Ed. 1923) § 2184, p. 632.

[18] *Adams v. New York*, 192 U.S. 585 (1904).

of production on the part of the defendant was required.[19] But in *Weeks v. United States*[20] this Court first held that evidence may be excluded on the ground of the method of its seizure, established not in the context of a motion to suppress in the criminal case, but a motion for return of property before trial on the ground that the government had no right to possess it, with the same result – the loss of the government's ability to offer the items as evidence at the criminal trial. Here the rationale for exclusion had no Fifth Amendment basis; rather, said this Court, "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgment of the courts. . . . To sanction [an unlawful invasion of the dwelling] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution. . . . " In short, the evidence was excluded to prevent the Government from obtaining an *advantage* through a violation of the Constitution by excluding evidence obtained as a *result* of – by a causal connection to – that violation.

Extension of this exclusionary rule to the states was found inappropriate in *Wolf v. Colorado*, in an opinion written by Justice Frankfurter.[21] But *Wolf* did not long survive, as in *Mapp v. Ohio*[22] the rule of *Weeks* was applied

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[19] Today, this situation is treated in some circumstances by a Fifth Amendment right to avoid having mention that the defendant was the one who produced the items, rather than a Fourth Amendment right to avoid producing them. See *United States v. Doe*, 465 U.S. 605 (1984); *Couch v. United States*, 409 U.S. 322, 327 (1973).

[20] *Weeks v. United States*, 232 U.S. 383 (1914).

[21] *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

[22] *Mapp v. Ohio*, 367 U.S. 643 (1961).

to the States as a "deterrent safeguard . . . ", the Court also quoting approvingly from *Elkins v. United States*[23] that "[t]he rule is calculated to prevent not to repair. Its purpose is to deter . . . by removing the incentive to disregard it."[24] From the beginning, then, the emphasis has been on deterrence by depriving the government of the "fruits" gained from the improper police conduct. It is now beyond dispute that the exclusionary rule is *not* "part and parcel" with the Fourth Amendment, but rather is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[25] Most recently this Court in *Pennsylvania Board of Parole v. Scott*[26] held that the exclusionary rule does not apply at parole violation hearings, the Court observing that the admission of illegally seized evidence does not violate the Constitution; rather, the Fourth Amendment is violated when the illegal search occurs. The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures, which has societal costs and is therefore not to be applied unthinkingly. Indeed, Chief Justice Warren remarked in *Terry v. Ohio*[27] that:

> The exclusionary rule has its limitations as a tool of judicial control. . . . [In] some contexts the rule is ineffective as a deterrent. . . . Proper adjudication

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[23] *Elkins v. United States*, 364 U.S. 206 (1960).

[24] *Mapp*, at 657.

[25] *United States v. Calandra*, 414 U.S. 338 (1974). See also *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Leon*, 468 U.S. 897 (1984).

[26] *Pennsylvania Board of Parole v. Scott*, 524 U.S. 357 (1998).

[27] *Terry v. Ohio*, 392 U.S. 1, 3-15 (1968).

> of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. . . . [A] rigid and unthinking application of the . . . rule . . . may exact a high toll in human injury and frustration of efforts to prevent crime.

The purpose of the rule, then, is not to repair, but to deter, and it does so by depriving the government of that which was gained as a result of the improper conduct of the police – that which flows from it as an effect from a cause (though not inevitably, causation being necessary but not always sufficient). Application of the rule carries with it a high societal cost in damaging the trial as a search for truth by excluding reliable and probative evidence, and it is thus not to be applied reflexively.[28] As one commentator has well put it, "[g]ranted that so many criminals must go free to deter the constable from blundering, pursuance of this police of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest."[29] What is a "thinking" application of the rule which at least attempts in some measure to avoid the infliction of gratuitous harm on the public? What are its current limits?

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[28] After all, any rule opposed – either entirely, or as to its extension to the states – by such giants as Justices Frankfurter, Harlan, and Cardozo – deserves careful scrutiny in its application (Justice Cardozo opposed the rule when sitting as a state judge in New York, where he made his famous statement "[T]he criminal is to go free because the constable has blundered." *People v. Defore*, 150 N.E. 585, 587 (N.Y., 1926)).

[29] Amsterdam, "Search and Seizure and Section 2255: A Comment," 420 Pa. L. Rev. 378, 388-389 (1964).

(2) Limitations on the Exclusionary Rule: The Requirement of Causation

> . . . [defendant] contends that . . . we must rely on a "perverted variation" of the "inevitable discovery" exception. . . . If this case involved any "exception" to the exclusionary rule at all, it would be the "independent source" exception. . . . We do not, however, have to apply either "exception" in this case because *the indispensable causal connection between his detention and discovery of the gun has not been met.*[30]

That "but-for" causation is a necessary but not always sufficient element of a claim that evidence should be excluded because of a constitutional violation by the police is readily apparent from exclusionary rule jurisprudence. As Professor LaFave has said, "in the simplest of Fourth Amendment exclusionary rule cases, the challenged evidence is quite clearly 'direct' or 'primary' in its relationship to the prior arrest or search, so that if it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of that evidence in the trial of a defendant who has standing to object to the violation."[31] But the exclusionary rule is not applicable in *all* cases where the evidence at issue would not have been discovered "but for" the improper conduct of the police, despite its deterrent effect in these situations. In some situations, the rule is not applied *despite* "but-for" causation because its cost is too high when weighed against its benefits.

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[30] *United States v. Pulliam*, 405 F.3d 782, 790-791 (CA 9, 2005) (emphasis supplied).

[31] 5 LaFave, *Search and Seizure* (3rd Ed.), § 11.4, p. 231-232.

- ***Personal Expectation of Privacy***: The Fourth Amendment protection is personal, and though excluding evidence where the Fourth Amendment rights of the individual against whom the evidence is offered were not offended might nonetheless carry with it some deterrent effect, it has long been recognized that the "need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."[32] The accused simply will not be heard to complain unless it is his or her Fourth Amendment rights that were compromised by the police.

- ***Fruit of the Poisonous Tree and Purged Taint***: Though *Nardone v. United States*[33] is the first case to make the point that a causal connection between improper governmental conduct and the discovery of evidence does not necessarily result in suppression, that principle came to full flower in *Wong Sun v. United States*.[34] This Court stated that the test for exclusion is *not* simply whether but for the illegal conduct of the police the evidence sought to be excluded would not have come to light, but whether, "granting establishment of the primary illegality, the evidence to which instant objection is made has

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[32] See *United States v. Calandra*, 414 U.S. 338, 348 (1974); *Rakas v. Illinois*, 439 U.S. 128 (1978).

[33] *Nardone v. United States*, 308 U.S. 338 (1939).

[34] *Wong Sun v. United States*, 371 U.S. 471 (1963).

been come at by exploitation of that illegality. . . ."[35] Even where there is a causal connection between the police illegality and the discovery of evidence, where the connection between the two has "become so attenuated as to dissipate the taint" the evidence is admissible nonetheless.[36]

- ***Inevitable Discovery***: In *Nix v. Williams*[37] this Court established the "inevitable discovery" doctrine. While, the Court said, the police may not place themselves in a *better* position through impermissible conduct than they otherwise would have been, there is no reason to put the police and public in a *worse* position than they would have been had the constitutional violation never occurred. Where the evidence would inevitably have been discovered it is simply not considered the fruit of the illegality – there is no exploitation of the illegality – and thus the illegality cannot cause its exclusion. This is a hypothetical doctrine; the evidence was discovered as a result of the illegal police conduct (there is a cause and effect relationship), but the prosecution can avoid exclusion by showing, hypothetically, and by a preponderance of the evidence, that the evidence would have been discovered if the illegality had not occurred.

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[35] *Wong Sun*, at 455.

[36] See similarly *Johnson v. Louisiana*, 406 U.S. 356 (1972); *United States v. Ceccolini*, 435 U.S. 268 (1978)

[37] *Nix v. Williams*, 467 U.S. 431 (1984).

- ***Independent Source***: Closely related to the fruit of the poisonous tree doctrine is the independent source doctrine – where there is improper police conduct resulting in the discovery of evidence in a "but for" sense, but the same evidence is come at by an independent lawful method, there is no reason to exclude it. This is distinguishable from inevitable discovery in that inevitable discovery does not posit an actual independent recovery of the evidence, but a hypothetical one, which the prosecution must demonstrate would have occurred without the illegality. With the independent source doctrine the evidence is actually obtained by a method independent of the improper one.[38]

- ***Noncriminal Proceedings***: Certain proceedings which are not criminal are not subject to the exclusionary rule. As already mentioned, this Court has recently held that the exclusionary rule does not apply to parole revocation proceedings. The exclusionary rule is a judicially created means of deterring illegal searches and seizures which exacts a high cost upon truth-seeking and law enforcement objectives. Particularly because parole is a variation of imprisonment, in itself a restraint on liberty, the State has an overwhelming interest in compliance with terms of parole which is hampered by application of the exclusionary rule. Moreover, parole proceedings are administrative and informal, a process which

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[38] See, e.g., *Murray v. United States*, 487 U.S. 533 (1988); *Segura v. United States*, 468 U.S. 796 (1984).

would be altered by application of the exclusionary rule, requiring in some cases extensive litigation on a collateral matter. The deterrence benefits of the rule, said the Court, simply do not outweigh its costs in this context. Thus, though the evidence may be a "but-for" result of improper police conduct, it will not be excluded in such a proceeding.[39]

- ***The Good-Faith Exception***: The good-faith exception was embraced by this Court in the companion decisions of *United States v. Leon*[40] and *Massachusetts v. Sheppard*.[41] *Leon* involved a search commanded by warrant, where a reviewing judge found the affidavit insufficient to show probable cause. *Sheppard* also involved a search commanded by warrant; the difficulty was that the lead detective employed a form for controlled substances search warrants though the warrant was not for controlled substances, and it was insufficiently modified and as a result still authorized a search for controlled substances. Evidence was found, then, that was not described in the warrant application, though described in the affidavit. This Court found exclusion inappropriate in both circumstances, observing that whether to employ the exclusionary sanction is an issue separate from the question of whether the Fourth Amendment rights of the person

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[39] See also *United States v. Janis*, 428 U.S. 433 (1978) with regard to civil actions.

[40] *United States v. Leon*, 468 U.S. 897 (1984).

[41] *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

> seeking to invoke the rule were violated by police conduct; that indiscriminate application of the exclusionary rule may well generate disrespect for the law and the administration of justice, and so its application should be restricted to those circumstances where its deterrent purpose is most efficaciously served; and that the deterrent function of the rule is not served when the evidence or contraband discovered is found as a result of police conduct that is objectively reasonable and in good faith.[42]

(3) Conclusion

The purpose of the exclusionary rule is to deter unlawful police conduct by preventing the Government from obtaining any advantage from that conduct. This end is accomplished by depriving the Government of the fruits of improper conduct. Where evidence is discovered which is a "direct" or "primary" result from improper police conduct – a direct effect from a cause – then the evidence will be excluded. But this rule of exclusion is not absolute, for even where the evidence sought to be admitted is the result of the improper conduct in that but for that conduct it would not have been discovered, the evidence will nonetheless be admissible if 1) the defendant is without standing to complain because it was not his or her right which was violated by the improper police conduct; 2) if the causal connection between the improper conduct and the discovery of the evidence is so attenuated that it can be said that the "taint" of the improper conduct is dissipated, or,

[42] *Leon*, at 906-922.

put another way, it can be said that the evidence was not obtained by police "exploitation" of the "primary illegality"; 3) the Government can demonstrate by a preponderance of the evidence that had the improper conduct which uncovered the evidence not occurred that evidence would have been discovered by lawful means; 4) the same evidence which was uncovered by the improper conduct is also obtained through a proper independent source; 5) the proceeding is not one to which the exclusionary rule is to be applied; or 6) the good-faith exception to exclusion is applicable under the circumstances.

In fine, "but-for" causation is a necessary – an indispensable – but not sufficient element of a claim that evidence should be excluded as a result of a constitutional violation by the Government; the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred.

C. Announcement and Exclusion of Evidence

(1) The Law Before *Wilson v. Arkansas*

The exclusion of evidence as a sanction for violation of principles of announcement where the search has otherwise been proper in all respects – the warrant demonstrates probable cause, and the search is one of proper scope and intensity – has slipped into the law almost by stealth. Its origins show no principled analysis of its application to a situation where causality is entirely absent; that is, where that which has been seized and is to be offered into evidence cannot be said in any principled

sense to be the "fruit" of the improper governmental conduct, particularly where in no other circumstance is the drastic sanction of exclusion ordered without a demonstration that *at least* there is a "but-for" causal relationship between the improper conduct and the discovery of the evidence. Petitioner relies heavily on *Miller v. United States*,[43] and it is thus with *Miller* that analysis should begin.

Clifford Reed was arrested on a Washington, D.C. street pursuant to an arrest warrant and told a federal narcotics agent that he had purchased heroin from Miller through an intermediary named Shepherd. Reed was to make another purchase from Shepherd that morning. An undercover officer accompanied Reed, and Shepherd agreed to obtain heroin and deliver it to the agent. Authorities followed Shepherd as he went by cab to Miller's apartment. Ultimately the agents went to Miller's apartment and knocked on the door. When Miller asked who was there they responded it was the police. Miller opened the door only partially, with an attached door chain barring the door, and the police forced their way inside when he began to close the door, ripping the chain off. Their purpose was to arrest Miller, but they had no warrant to arrest, and had not expressly demanded admission or stated the reason for their presence. Marked money that had been given to Reed to purchase the heroin was found in a search of the apartment; none of it was found on Miller's person. The principal claim before this Court was that Miller's arrest was unlawful not because of a lack of

[43] *Miller v. United States*, 357 U.S. 301 (1958).

probable cause, but because of the manner of entry to achieve the arrest.

Justice Brennan writing for the court observed that the common law had historically limited the authority of law enforcement officers to break the door of a house to effect an arrest, except that authority existed allowing forcible entry to effectuate a felony arrest. What was unclear at the common law was whether a forcible entry to arrest for a felony required the existence of an arrest warrant. But in any circumstance, said the Court, the forcible entry was unlawful unless the officer first stated his authority and purpose for demanding admission, unless some exception existed under the circumstances. In the case before it, the Court found that this requirement had not been met, rendering the arrest "unlawful" and the evidence, which again was not found on the person of Miller, inadmissible. It must be noted that the Court was not purporting to discover and announce a constitutional principle; its ruling was instead premised on the law of the District of Columbia, which all parties agreed was identical to 18 U.S.C. § 3109, which concerns on its face, however, only the execution of search warrants.

A decade later the Court considered a similar question in *Sabbath v. United States.*[44] Again the case involved a drug transaction. William Jones was caught possessing cocaine by customs agents, which he said he was to transport to a person named "Johnny" in Los Angeles. The agents called a telephone number in his possession, and Jones addressed the man answering as "Johnny" and said he had "his thing" and would bring it to his apartment.

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[44] *Sabbath v. United States*, 391 U.S. 585 (1968).

Equipped with a listening device, Jones made the delivery. Before he left the apartment the agents went to the apartment door, knocked, and, receiving no response, opened the unlocked door and proceeded inside. Sabbath was arrested and the cocaine found under a couch cushion, from which Sabbath was seen withdrawing his hand as the agents entered. Though 18 U.S.C. § 3109 only concerns entries to execute search warrants, the Court again stated that entries to arrest "must be tested by criteria identical to those embodied in" the statute, so that "we must look to § 3109 as controlling." The Court rejected the argument that opening an unlocked door does not violate the statute, holding essentially that the statute prohibits "unannounced intrusions" into a dwelling for the purpose of arrest or search. The drugs found were thus suppressed, the Court this time not stating that the arrest of Sabbath was improper, but that the "agents' entry" was not "consonant with federal law."[45]

Since *Miller* and *Sabbath* the Court has clarified several matters. First, absent exigent circumstances, an arrest warrant and reason to believe the person sought is in the dwelling are necessary before a nonconsensual entry may be made into the dwelling of that individual to arrest him or her.[46] The Fourth Amendment prohibition against unreasonable seizures of the person is violated if, in other words, the manner of entry into the dwelling to achieve the arrest is improper. But the question then arose, assuming an entry to arrest without warrant and without exigent circumstances justifying its absence, what

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[45] *Sabbath*, at 588.

[46] See *Payton v. New York*, 445 U.S. 544 (1980).

are the *fruits* of this entry? This question was reached in *New York v. Harris*.[47] There the police made an improper entry because no arrest warrant existed, and defendant later confessed. Under petitioner's view of the constitution this error of the police cannot be severed or distinguished from that which followed, so that the arrest should have been viewed as invalid and the confession suppressed as the fruit of that constitutionally unreasonable arrest. This Court did not so hold.

The holding of this Court puts the lie to petitioner's view of the constitution, for this Court focused on the nature of the impropriety and whether that "primary illegality" was "exploited" so as to obtain the evidence. The seizure of the person was made on probable cause but after an entry into the premises to achieve it which the Fourth Amendment does not allow. Rather than applying petitioner's "one size fits all" view of Fourth Amendment violations, this Court found that the improper entry violated the privacy of the dwelling, causing the suppression of physical evidence discovered in the dwelling, if any, as that evidence is gained by exploitation of the primary illegality. But the seizure of the arrestee's *person* in this situation, so long as based on probable cause, is not gained by exploitation of the primary illegality of the invasion of privacy of the dwelling, so that evidence associated with defendant's person – his confession later to the police – was not the fruit of the improper entry.[48] *Miller* thus spoke overbroadly in referring to the probable-cause based arrest after an improper entry as illegal, as the seizure of the

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[47] *New York v. Harris*, 495 U.S. 14 (1990).

[48] *Harris*, at 20.

person is proper and only the entry improper. The *manner* of effectuating the seizure of the person violated the Fourth Amendment, but because the violation that occurred was disconnected from the evidence discovered, suppression was inappropriate.

(2) *Wilson v. Arkansas*: Announcement, Causation, and Use of the Exclusionary Rule as a Scalpel

In *Wilson v. Arkansas* this Court found that "[t]he common-law knock-and-announce principle was woven quickly into the fabric of early American law," concluding that "[g]iven the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment."[49] But because not properly before it, this Court did not reach the causation issue now raised. In avoidance of the lack of a causal connection between the police error with regard to the manner of entry and the discovery of evidence described in the valid warrant, the heart of petitioner's claim – indeed, absolutely essential to it – is the assertion that if a search is unconstitutional in *any* particular it is unconstitutional in *every* particular; in other words, that it is impossible to differentiate the component parts of a search. In petitioner's view, then, a

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[49] *Wilson*, at 934.

completely unauthorized invasion of privacy of the dwelling, justified neither by warrant nor any exception to the warrant requirement, is no different in kind from an invasion of privacy justified by a valid judicial warrant, where the police search within the dwelling in appropriate places for the items sought but use arguably unnecessary force in making their entry. But as *New York v. Harris, supra*, reveals, this view is without foundation. The police in *Harris* were found to have acted unreasonably in achieving their seizure of the defendant, not because probable cause for his arrest was lacking, but because in executing their seizure they invaded his dwelling without an arrest warrant.[50] This Court readily distinguished between the improper entry, and the interests protected by that invasion, and the seizure of the person of the arrestee on probable cause, holding defendant's confession admissible because it related to the seizure of the person not the invasion of the dwelling (even though one could argue that in a "but for" sense the confession would not have been obtained, this Court's holding once again demonstrating that but-for causation is a necessary but not sufficient requirement for application of the exclusionary rule).

Harris scarcely stands alone in this regard. In the execution of a valid search warrant the searching officers may in the intensity of their search exceed the scope justified by the items for which they are searching and search in places where the items particularized in the

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[50] *Payton* does not require a search warrant for the defendant's dwelling to effectuate the arrest, but an arrest warrant; the case is thus a seizure-of-the-person case, not a "search" case, and the holding of the Court is that the manner of executing the seizure is unreasonable if there is not both an arrest warrant and reason to believe the defendant is in the dwelling.

warrant could not be found. If they do, they have executed the warrant in an unreasonable manner. What result, then, if the items described in the warrant are found during the search of appropriate scope, and either nothing is found in the portion of the search that is excessive, or contraband or other items indicating criminality are found in that portion of the search? If petitioner's "unitary theory" of warrant execution is correct, the overbroad search renders the entire search an unreasonable search, and so those items found that were named in the warrant and found appropriately must be suppressed because of the error of the police in searching places not authorized. But that is not the law – in fact, the law is quite clearly to the contrary. In this situation if contraband or evidence is found during the search exceeding the scope of the warrant, then those items are suppressed; if nothing is found during that portion of the search, then there is nothing *to* suppress; but in neither circumstance is that found during the search of proper scope subject to exclusion.[61] The same

[61] This is plainly the rule for "ordinary" cases of this type. See *United States v. Medlin*, 842 F.2d 1194, 1199 (CA 10, 1988), recognizing an exception to this principle; "[w]hen law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." But even this exception to the general rule that exclusion is inappropriate is not universally followed. See *Klingenstein v. State*, 624 A.2d 532, 537 (Md., 1993) ("Although courts in other jurisdictions have discussed the exception, our attention has been called to only two cases in which the flagrant disregard concept has been applied to suppress all of the fruits of a search, both those constitutionally seized as well as those beyond the scope of the warrant. *United States v. Medlin*. . . . We are not persuaded to overlay the exclusionary rule of the Fourth Amendment with the 'flagrant disregard' concept. The Supreme Court has not seen fit to do so and neither do we"). And see *United States v. Le*, 173 F.3d 1258, 1269 (CA 10, 1999), recognizing

(Continued on following page)

result obtains if the warrant itself is overbroad in its description of items to be seized. It is well-established that those items seized which were described with sufficient particularity will be admitted, a doctrine impossible under petitioner's theory of the Fourth Amendment.[52]

Similarly, officers effectuating an arrest, either under warrant or without warrant, but in either case with probable cause, might err in their use of force in achieving that arrest. The seizure of the person of the arrestee is justified by the Fourth Amendment in this circumstance, but the force used is unreasonable. The manner of achieving the seizure, while subject to censure and quite possibly damages, does not result in the suppression of evidence found incident the seizure of the arrestee's person, such as by way of search incident arrest, as the discovery of that evidence is causally disconnected from the error of the police.[53] Also, this Court has held that execution of a search warrant is constitutionally unreasonable if the police allow third persons unnecessary to the execution of the warrant into the premises,[54] but no exclusionary sanction is applied to evidence recovered by the police

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that the rule even in the Tenth Circuit is that ordinarily "a search is not invalidated merely because some things are seized that are not stated in the warrant," the *Medlin* rule being applied in "very rare cases. . . ."

[52] See, e.g., *United States v. Reed*, 726 F.2d 339, 342 (CA 7, 1984); *United States v. Sears*, 411 F.3d 1124 (CA 9, 2005).

[53] See, e.g., *State v. Sundberg*, 611 P.2d 44, 50-52 (Alaska, 1980); *Winfrey v. State*, 78 P.3d 725, 729 (Alaska App., 2003); *State v. Spotted Horse*, 462 N.W.2d 463, 470 (S.D., 1990).

[54] *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

during the search because of this error.[55] The *entire* search is not rendered improper by this error on the part of the police, and the matter is left to damage suits. So also here.

Petitioner, as well as several of the cases and a few commentators, relies heavily on a straw-man inevitable discovery theory, positing it as the basis of the Respondent's position, and then attacking it. But as Justice Thomas recognized in *Wilson*, the argument that exclusion does not apply here is not one of either inevitable discovery or independent source, except by analogy. The actual argument of Respondent is that "any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation."[56] And it is to defeating the causation argument that petitioner's "unitary theory" is essential, but unavailing.

Petitioner's mocking description of Respondent's claim as a "if we hadn't done it wrong, we would have done it right"[57] theory of inevitable discovery not only misdescribes Respondent's argument, but is mistaken on its own terms. Ordinarily, a showing that "if we hadn't done it wrong, we would have done it right" *is* sufficient under the inevitable discovery doctrine. If, for example, the police arrest an individual in an automobile, and, thinking they have probable cause to search, search the vehicle beyond those areas justified by search incident arrest principles and discover evidence or contraband, that evidence will

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[55] *United States v. Hendrixson*, 234 F.3d 494, 497 (CA 11, 2000); *State v. Nelson*, 691 N.W.2d 218, 229 (N.D., 2005); *Artis v. United States*, 802 A.2d 959, 968 (D.C., 2002).

[56] *Wilson v. Arkansas*, at 937.

[57] Petitioner's Brief at 18, quoting 6 LaFave, *Search and Seizure: A treatise on the Fourth Amendment* (4th Ed.), § 11.4(a), at 272-274.

not be suppressed if probable cause is found lacking if it can be shown that under standard police policy the automobile would have been impounded and an inventory search would have occurred that would have revealed the evidence or contraband in any event.[58] The inevitable-discovery doctrine in fact *does* posit the rule that if it can be shown hypothetically by a preponderance of evidence that evidence discovered when the police "did it wrong" *would* inevitably have been discovered by the police doing it "right" in the ordinary course of events, then the evidence will not be suppressed. What the inevitable-discovery rule does *not* posit is that evidence is not subject to exclusion if it can be shown that though the police "did it wrong" they "*could* have done it right." And it is *this* straw-man inevitable-discovery "principle" to which petitioner actually objects as overbroad. Surely, if the police break into a house without a warrant or the existence of any warrant exception and search and find evidence or contraband, exclusion cannot be avoided on the ground that probable cause existed so that the police "could" have obtained a warrant and accomplished the search correctly. But *Nix v. Williams* itself demonstrates that evidence is admissible when it "would" inevitably have been discovered properly though it was actually discovered through police error. On his own terms, then, petitioner is incorrect, as are the cases rejecting the

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[58] See, e.g., *United States v. Mendez*, 315 F.3d 132 (CA 2, 2002); *United States v. Blaze*, 143 F.3d 585 (CA 10, 1998); *Camacho v. State*, 75 P.3d 370, 376 (Nev., 2003); *Ettipio v. State* 794 S.W.2d 871, 873 (Tex. App., 1990).

principle followed by Michigan and the Seventh Circuit.[59] But petitioner's terms are not the correct ones; the matter is not one of inevitable discovery, but causation.

Analogous to the causation issue involved here is *Segura v. United States*.[60] The defendant was arrested on probable cause in the lobby of his apartment building and taken to his apartment unit by the police. When his codefendant opened the door the police entered without permission, and, during a limited security check of the apartment, observed drug paraphernalia. Two agents remained in the apartment while a search warrant was obtained. The warrant was executed and three pounds of cocaine, as well as other evidence, was found. The warrant affidavit showed probable cause and was based entirely on evidence independent of the observations made during the improper entry into the apartment. In other words, had that entry *never occurred* the warrant would still have been issued and the search would have taken place, as the warrant affidavit did not rely in any way on the observations in the apartment. This Court held that the properly executed search under a warrant which was not gained through information obtained in the unlawful entry was an independent source for the discovery of the evidence found in the apartment, so that discovery of the evidence was causally disconnected from the error of the police.

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[59] See, e.g., *Ramirez v. United States*, 91 F.3d 1297 (CA 9, 1996), rev'd *United States v. Ramirez*, 523 U.S. 65 (1998); *State v. Martinez*, 579 N.W.2d 144 (Minn. App., 1998); and cases cited by the Petitioner.

[60] *Segura v. United States*, 468 U.S. 796 (1984).

To much the same effect is *Murray v. United States*.[61] There federal agents, believing that narcotics were being stored in a warehouse, made an illegal entry into the warehouse and discovered wrapped bales which they suspected contained marijuana. The premises were kept under surveillance while a warrant was obtained based upon probable cause wholly independent of the improper entry into the warehouse. The warrant was executed and the bales seized. This Court found the case governed by *Segura* and the purposes of the exclusionary rule. The defendant attempted to limit the independent source doctrine by arguing that it applies only to evidence which had not been discovered at all during an improper search, but as to that which had been discovered, suppression was required even if the evidence was later discovered validly through a wholly independent method. The Court found the defendant's description of the independent source doctrine inconsistent with prior cases and unsound as a matter of policy. Prior cases, including *Segura*, had applied the independent source doctrine to all evidence discovered pursuant to an independent source, whether previously also discovered improperly or not. Indeed, Justice Holmes had applied the doctrine to an untainted search which acquired evidence "*identical to the evidence unlawfully acquired*."[62] The basis of the independent source doctrine, much like that of the inevitable discovery doctrine, is that "[t]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the

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[61] *Murray v. United States*, 487 U.S. 533 (1988).

[62] See *Silverthorne Lumber v. United States*, 251 U.S. 385 (1920) (emphasis supplied).

police *in the same*, not a *worse*, position than they would have been in if no police error or misconduct had occurred."[63] It is in this sense, then, that the exclusionary rule is not applied to put the police in a worse position than they would have been if no error occurred – where it can be demonstrated that the evidence, as a hypothetical matter, would inevitably have been discovered in the ordinary course of events without the police error, not that it "*could*" have been discovered if the police had thought to go at the matter a different way, without any showing that this course would have been followed in any event if the erroneous conduct had not occurred. And the argument here is even stronger, for the evidence is not come at by police error, and also then obtained independently of that

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[63] See, to the same effect, *United States v. Markling*, 7 F.3d 1309 (CA 7, 1993) ("The exclusionary rule is a sanction, and sanctions are supposed to be proportioned to the wrong-doing that they punish . . . (the interests of society and the accused) are properly balanced by putting the police in the same, not a worse position than they would have been if no police error misconduct had occurred"); *United States v. Fialk*, 5 F.3d 250 (CA 7, 1993) ("applying the exclusionary rule here 'would put the police in a worse position than they would have been absent any error or violation'. . . . This is not the purpose of the exclusionary rule. . . ."); *United States v. Gravens*, 129 F.3d 974 (CA 7, 1997). And see also *United States v. Pulliam*, supra, at p. 791, rejecting a claim that the court was applying a "perverted" form of inevitable discovery in finding the discovery of a gun in a car not causally linked to defendant's detention: "If this case involved any 'exception' to the exclusionary rule at all, it would be the 'independent source' exception, since the gun was actually found in a search of the car. . . . We do not, however, have to apply either "exception" in this case because the indispensable causal connection between his detention and discovery of the gun has not been met. The requisite but-for causation is missing not only because the gun was found as a result of the search, but because his [defendant's] detention simply did not contribute or lead to the gun's discovery."

discovery; rather, the police error here is causally disconnected from the discovery of the evidence in the first instance.

D. Causation is a Necessary Predicate for Exclusion

Neither the Michigan Supreme Court nor the Seventh Circuit approach the question here by way of petitioner's straw-man inevitable discovery route. Though the Michigan Supreme Court in *Stevens* used the term "inevitable discovery" and also referred to the discovery of the evidence as "independent" of the violation by the police, it is plain that the basis for the court's decision was the causal disconnect between the violation by the police and the discovery of the evidence. So also the Seventh Circuit, Judge Posner remarking in the *Jones* case that:

> A causal link between unlawful police conduct and a seizure is *necessary but not sufficient* to justify the exclusion of reliable evidence. The inevitable discovery doctrine . . . and the independent source doctrine . . . show that violations of the fourth amendment do not automatically lead to suppression when the constitutional wrong plays a causal role in the seizure (at least, in the timing of the seizure). . . . It is hard to understand how the discovery of evidence inside a home could be anything but 'inevitable' once the police arrive with a warrant; an occupant would hardly be allowed to contend that, had the officers announced their presence and waited longer to

> enter, he would have had time to destroy the evidence. . . .[64]

If one asks the *right* question – is evidence discovered as a result of a search of proper scope and intensity pursuant to the command of a valid warrant the effect or fruit of the failure of the police either to announce or to wait long enough before entering – a negative answer follows ineluctably, *unless* a purpose of the knock and announce requirements is to allow those inside an opportunity to frustrate the warrant by hiding or destroying evidence or harming the officers who are executing it. The wrong question is whether the evidence is the effect or fruit of an "illegal entry" or an "illegal search," as both the entry and the search are legal; it is the *manner* of entry which is improper, and its fruit may be a broken door, or there may be no fruit at all.[65] Exclusion of evidence in this circumstance cannot be squared with *Wong Sun* because there is no exploitation of the primary illegality, the evidence instead being discovered by "exploitation" of the command of the search warrant, not the manner of the entry, and also cannot be squared with either inevitable discovery or independent source principles. The short answer is that but-for causation is a necessary but not sufficient requirement for application of the exclusionary rule, as these doctrines demonstrate, and it is *entirely missing here.*

Petitioner's single-minded devotion to exclusion even in the absence of a causal connection between the police

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[64] *Jones*, at 716.

[65] And in some unfortunate situations injuries may occur, and one purpose of the announcement requirement is to avoid these; Respondent is not arguing that *Wilson* was wrong, but the issue here goes to consequences in a criminal case from police error in this regard.

error and the discovery of evidence or contraband brings to mind the adage that "when all you have is a hammer, everything looks like a nail." Though this Court has never sought out "alternative sanctions" in other situations, described above by Respondent, where but-for causation is absent, Respondent would note that now, especially since *Wilson* has recognized the constitutional status of announcement principles, civil remedies exist under 42 U.S.C. § 1983 for announcement violations. Such actions *are* brought,[66] and it is quite possible that principles of

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[66] See, e.g., *Green v. Butler*, ___ F.3d ___, 2005 WL 2018888 (CA 7, 2005) (reversing a grant of summary judgment, and finding no qualified immunity for the unannounced entry); *Kornegay v. Cottingham*, 120 F.3d 392 (CA 3, 1997) (reversing grant of summary judgment in favor of officers executing the warrant); *Aponte Matos v. Toledo Davila*, 135 F.3d 182 (CA 1, 1998) (finding qualified immunity but only because the search took place prior to *Wilson*, and the officers were entitled to immunity as they thus did not violate "clearly established constitutional law" in the manner of entry prior to *Wilson*, a holding which would not obtain to entries after *Wilson*); *Johnson v. City of Aiken*, 217 F.2d 839 (CA 4, 2000) (unpublished opinion) (damages awarded but reversed because of reasonable belief of danger); *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d 293 (CA 5, 2005) (settlement reached with DEA agent involved in the entry); *Gould v. Davis*, 165 F.3d 265 (CA 4, 1998) (defendants' motion for summary judgment on grounds of qualified immunity denied); *Ingram v. City of Columbus*, 185 F.3d 579 (CA 6, 1999) (reversal of district court's grant of summary disposition on the knock and announce claim and remanded); *Smith v. Stone*, 40 Fed. Appx. 197, 2002 WL 1478619 (CA 6, 2002) (denial of defendant's motion for summary judgment on claim of knock-and-announce violation and remand to the district court); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179 (CA 10, 2001) (defendant's motion for summary judgment denied – genuine issue of material fact existed regarding whether there was a knock and announce violation); *Turner v. Tomey*, 94 F. Supp. 2d 966 (Ind., 2000) (summary judgment to officers denied); *Early v. Bruno*, 2001 WL 775968 (ND Ill., 2001) (summary judgment granted in part denied in part regarding announcement claim); *Michalik v. Herman*, 2003 WL 2180537 (ED LA, 2003) (summary judgment for defendants in

(Continued on following page)

risk-management by governmental bodies are a greater incentive to observance of constitutional principles than exclusion of evidence. But employing the same "sanction" where the police had every right to enter and to search and seize, but entered too quickly, as when the police had no right to invade premises and seize property at all, simply makes no sense. In the latter situation privacy should not have been invaded; in the former, the announcement failure, it has been invaded by a valid judicial command. *Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense.* These violations are simply different in kind, and Respondent submits that it is myopic to treat them as though they were no different at all. Exclusion of evidence where there has been an authorized invasion of privacy and a proper discovery and seizure of evidence, then, is not, Respondent submits, an appropriate sanction for police error with regard to announcement of presence and purpose. There is no element of "causality" involved. The evidence is not the fruit of an announcement failure because the invasion of privacy involved is completely justified – and exclusion in this context makes no sense, simply thwarting the enforcement of the law, and giving unwarranted immunity to one in possession of drugs.

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announcement claim denied). And it is not surprising if frequently such actions fail, given that announcement may permissibly be foregone if the officers have a reasonable suspicion that to announce would frustrate the warrant, is a futile gesture, or is dangerous under the circumstance of the particular case. Further, in cases like the present one, where the officers simply opened the door, damages may be virtually nonexistent.

Exclusion is not designed to put the police in a worse position than if the improper conduct had not occurred, but to prevent them from being in a better position *because* of that conduct. The drugs found here were not the fruit of any announcement violation.[67] Again, if the search warrant was proper and properly executed as to scope and intensity of the search, then the only way the discovery of contraband or evidence on the premises may be viewed as "poison fruit" is to take the view that the failure to knock and announce deprived those inside the opportunity to destroy or successfully hide the evidence. One would hope that no responsible society would take such a view. This Court should repudiate such a principle.

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[67] Indeed, given that the exclusionary rule is not, as this Court has repeatedly said, constitutionally mandated, Respondent questions whether its forced application on a State that has chosen another path *in circumstances where the evidence sought to be suppressed was not discovered as a result of the error of the police* is a proper exercise of this Court's authority.

CONCLUSION

Wherefore, Respondent respectfully requests that this Court affirm the Michigan Court of Appeals.

Respectfully submitted,

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In The Supreme Court of the United States

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Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

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REPLY BRIEF

I. The Evidence Found Inside a Home Following a Knock and Announce Violation Is the Suppressible Fruit of an Illegal Entry.

Respondent's argument consists almost entirely of an effort to recast the issue in this case. Apparently realizing that the Michigan Supreme Court's *per se* rule of admitting evidence seized after knock and announce violations is inconsistent with the inevitable discovery and independent source doctrines, Respondent reframes the issue as one of causation. According to Respondent, a knock and announce violation does not *cause* the evidence found in the home to be seized; it is the warrant that authorizes the search that causes the seizure. Therefore, Respondent reasons, the evidence should not be suppressed because the violation is not the but-for cause of the seizure.

Respondent's new argument is nothing more than a name change. The argument boils down to the claim that the police presumably would have found the evidence had they knocked and announced; that is, that the evidence was derived not from the violation but from an independent source or that it would have been inevitably discovered without the violation. But as Petitioner established in his principal brief, such arguments do violence to the independent source and inevitable discovery doctrines because both doctrines depend on the existence of an independent and untainted process to recover the evidence. By contrast, Respondent's "causation" argument simply assumes away the violation.

Respondent's "but-for causation" test would apparently swallow much of the exclusionary rule. For example, if the police have probable cause for a search but elect to

enter and search a home without obtaining a warrant, Respondent never explains how it can be said that the failure to obtain the warrant *caused* the seizure of the evidence any more than the failure to knock and announce *caused* that seizure. In both cases, the evidence still would have been found had the police acted constitutionally, but Respondent never explains how one violation "causes" the evidence to be found while the other does not. While Respondent and the United States disclaim any such result, both agree that their sweeping "causation" doctrine would exempt, at the very least, all Fourth Amendment violations relating to the manner of entry or arrest from the exclusionary rule.

Neither Respondent nor its *amici* have suggested any plausible way in which the knock and announce rule can be enforced without the exclusionary sanction. Without an effective enforcement mechanism, an ancient and important privacy safeguard will be lost.

A. A Knock and Announce Violation Renders the Entry Illegal and Therefore "Causes" the Evidence Inside To Be Illegally Seized.

1. As *Miller*, *Sabbath*, and *Wilson* Confirm, a Knock and Announce Violation Renders the Entry Illegal and the Search Inside Unreasonable.

The simplest answer to Respondent's argument that a knock and announce violation does not "cause" any evidence to be illegally seized is that it is contrary to precedent. This Court has repeatedly rejected the view that a knock and announce violation is merely a minor technical error that is somehow disconnected from the police activity

that occurs inside the home immediately following the violation. Thus, the Court plainly held in both *Miller v. United States*, 357 U.S. 301, 313-314 (1958), and *Sabbath v. United States*, 391 U.S. 585, 587 (1968), that the knock and announce violations in those cases required suppression of evidence found inside.

Faced with the undeniable fact that the Court has suppressed evidence seized inside homes following knock and announce violations, Respondent and the United States strain to distinguish and discredit *Miller* and *Sabbath*. According to the United States, the evidence in *Miller* and *Sabbath* was actually suppressed not because of the knock and announce violations but because the officers did not have arrest warrants and, therefore, the arrests were illegal. Brief of United States at 22. The United States is simply mistaken. In both *Miller* and *Sabbath*, the Court unmistakably suppressed the evidence because of the knock and announce violations, not because the officers lacked warrants. *See Miller*, 357 U.S. at 313-314 ("Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed."); *Sabbath*, 391 U.S. at 586 ("We hold that the method of entry vitiated the arrest and therefore that evidence seized in the subsequent search incident thereto should not have been admitted at petitioner's trial."). Contrary to the argument of the United States, there is no indication in either *Miller* or *Sabbath* that this Court would have reached a different result if the officers had warrants.

Respondent and the United States also point out, correctly, that *Miller* and *Sabbath* were statutory decisions, but ignore the fact that this Court has repeatedly

confirmed that the federal statute at issue in those cases codified the same common law that informed the Fourth Amendment. *See United States v. Banks*, 540 U.S. 31, 42-43 (2003); *United States v. Ramirez*, 523 U.S. 65, 73 (1998).

Finally, the United States asserts that "*Miller* and *Sabbath* were rendered at a time when the Court assumed that all federal violations of the law governing search and seizure required the suppression of all evidence seized." Brief of United States at 21. Nothing could be further from the truth. Almost forty years before *Miller*, the Court held that evidence obtained through a source independent of the illegality was admissible, *see Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), and almost twenty years earlier the Court recognized that evidence attenuated from the violation was not suppressible either, *see Nardone v. United States*, 308 U.S. 338, 341 (1941). Indeed, in between the time of the decisions in *Miller* and *Sabbath*, this Court applied these doctrines in *Wong Sun v. United States*, 371 U.S. 471, 487-493 (1963), to conclude that some of the evidence obtained after an illegal entry and several illegal arrests was admissible, while other evidence was not.

It is, therefore, a distortion of history to argue that *Miller* and *Sabbath* come from an era in which this Court unthinkingly suppressed evidence upon finding a violation. It is true that this Court did not discuss at length its holding suppressing the evidence in those cases, but that is because it was obvious that a knock and announce violation rendered illegal both the entry and the subsequent police activity inside the home. Indeed, there can be no doubt about the continuing vitality of that proposition after *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995), where

the Court wrote, "we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *See also id.* at 931 ("An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.").

The point, then, is that the evidence found inside a home following a knock and announce violation is the fruit of that violation because the violation renders the police entry illegal, just as the failure of the police to obtain a search warrant renders an entry to search illegal absent an exigency. But for the illegal entry, the police would not be inside the home to find the evidence, so the evidence is the suppressible fruit of the illegality.

2. Respondent's "Causation" Argument Is Ill-Defined and Contrary to Precedent.

Respondent, apparently persuaded that the inevitable discovery doctrine cannot justify the result it desires, disclaims any reliance on that doctrine. Respondent's Brief at 27.[1] Instead, Respondent continues, the issue is one of causation.

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[1] Respondent also criticizes Petitioner for knocking down a "straw-man" inevitable discovery argument that the evidence should be admissible if the police would have found the evidence acting lawfully. Petitioner can only respond by pointing out that this "straw-man" inevitable discovery theory was precisely the one on which the Michigan Supreme Court relied. *See People v. Stevens*, 597 N.W.2d 53, 62 (Mich. 1999) (holding evidence admissible because it "would have been

(Continued on following page)

Respondent's abandonment of the inevitable discovery theory is appropriate for the reasons set forth in Petitioner's brief. The inevitable discovery doctrine, like the independent source doctrine, requires the existence of an independent source or process that resulted, or inevitably would have resulted, in the discovery of the evidence. The absence of any such independent process distinguishes this case from *Murray v. United States*, 487 U.S. 533 (1988), and *Segura v. United States*, 468 U.S. 796 (1984), in which the police initially entered illegally but then later performed searches and seizures that were, or were claimed to be, wholly independent from the initial illegal entries. The absence of an independent process also distinguishes this case from *Nix v. Williams*, 467 U.S. 431 (1984), in which search parties with no connection to the constitutional violation inevitably would have discovered the evidence.

Unlike the independent source and inevitable discovery doctrines that it now disclaims, Respondent's "causation" theory is never precisely defined, but it appears to be an inevitable discovery or independent source argument without the crucial requirement of an independent source or process. According to Respondent, the knock and announce violation should not result in suppression of the evidence found inside because "but-for causation is necessary to the sanction of suppression" and the evidence found inside a home following a knock and announce violation is actually "the fruit of [the] judicial command" to search the home. Respondent's Brief at 2, 3. In other words, it appears that Respondent's argument boils down

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inevitably discovered . . . had the police adhered to the knock-and-announce requirement").

to the claim that the same evidence would have been found by virtue of the warrant even if the police had properly knocked and announced. But this is exactly the "if we hadn't done it wrong, we would have done it right" inevitable discovery argument that Respondent purports to reject.

It is difficult, however, to be certain whether Respondent's causation theory is distinguishable from an inevitable discovery argument because Respondent never explicitly spells out its theory. Thus, Respondent fails to explain how its theory is compatible with the raft of precedent, discussed at length in Petitioner's Brief at 30-33, in which this Court suppressed evidence even while recognizing that the police could have obtained that same evidence lawfully. Respondent never explains, for example, how, under its theory, the unlawful search of the car in *Knowles v. Iowa*, 525 U.S. 113 (1998), is the but-for cause of the seizure of the evidence since the officer could have lawfully obtained the same evidence from the car by first arresting Knowles. Nor does Respondent explain how, under its theory, the agents' failure to obtain a warrant in *Katz v. United States*, 389 U.S. 347 (1967), was the but-for cause of Katz's conversation being intercepted given that the Court observed that the agents easily could have obtained a warrant to place a listening device on the phone booth.

Perhaps Respondent believes that the evidence should not have been suppressed in *Knowles*, *Katz*, and the many other cases in which this Court has suppressed evidence while noting that the same evidence could have been obtained legally. That is, perhaps Respondent believes that its test of "but-for causation" is not met in any of those

cases. If that is Respondent's position, it would work a radical restructuring of the exclusionary rule.

Respondent's failure to explain its causation theory is most stark in its treatment of home searches. Respondent agrees that evidence should be suppressed if the police search a home without a warrant, even if they have ample probable cause. But Respondent never explains how that concession is consistent with its "but-for causation" test. If the police have probable cause to obtain a search warrant but choose to act without one, Respondent does not explain how that failure to obtain a warrant is the "but-for cause" of the subsequent discovery of the evidence while the failure to knock and announce is not. In both cases, the police do not need to act unlawfully to obtain the evidence. In both cases, however, the police do act unlawfully and thereby perform an illegal entry into a home. Respondent's theory of "causation" cannot differentiate the two types of illegal entries.

While Respondent's theory of causation is not well-defined, it apparently would result in the conclusion that the *manner of entry* is, as a *per se* matter, beyond the reach of the exclusionary rule. Respondent's Brief at 33; *see also* Brief of United States at 13. That is, Respondent would divorce the entry performed under a warrant from the warrant itself. Respondent believes that the existence of a warrant makes an officer's presence inside a home lawful regardless of how the officer got inside.

This view of the significance of a warrant is wrong. A warrant is not independent of the entry it authorizes. The warrant permits an officer to make a *lawful entry* in order to perform a search inside a dwelling.

Therefore, American courts have long recognized that the presence of an officer inside a dwelling is unlawful if he or she entered the dwelling in an illegal manner even if he or she had legal authority. *See, e.g., Ilsley v. Nichols*, 29 Mass. 270, 281 (1831) ("An officer, having a valid writ, if he does not pursue the authority given him by his writ, and the rules of law in the execution of his duty under it, is a trespasser, in the same manner as if he had no writ"); *State v. Armfield*, 9 N.C. 246 (1822) (holding that an officer who illegally breaks open a door to serve a civil process "is a trespasser"); *Curtis v. Hubbard*, 4 Hill 437 (N.Y. Sup. Ct. 1842) ("The . . . question is whether a sheriff, who has entered the house of another in direct violation of the law, for the purpose of arresting the owner or seizing his goods, can be justified in consummating the wrong by arresting his person or removing the goods, where it is all one continuous act. I think, upon authority as well as upon principle, he cannot."). This Court, of course, reached the same conclusion in suppressing the evidence seized inside the homes in *Miller* and *Sabbath*, since the officers in those cases had, or were assumed to have, lawful authority to perform the entries.

Respondent, however, argues that the manner of entry is irrelevant to the Fourth Amendment reasonableness of the police activity inside the dwelling. Once the officer is inside, Respondent maintains, it no longer matters if he unreasonably breached the door because that illegality is now over. It follows from Respondent's argument that it would not matter if the officer used dynamite to make the unannounced entry or if he sneaked in through the bedroom window. Yet, as this Court has squarely recognized, "the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the

factors to be considered in assessing the reasonableness of a search or seizure." *Wilson*, 514 U.S. at 931.

In short, if an officer violates the knock and announce requirement, the warrant in his hand does not change the fact that his presence inside the home is both illegal and unreasonable. The evidence the officer finds inside the home is the fruit of that unlawful entry because that illegal entry is used to accomplish the search of the dwelling. In this case, then, Officer Good would not have been in a position to arrest and search Petitioner had Officer Good not entered the home. As the entry was concededly illegal, the arrest and search of Petitioner inside his home was the fruit of that illegal entry.[2]

In this regard, Respondent's heavy reliance on *New York v. Harris*, 495 U.S. 14 (1990), is puzzling. *See* Respondent's Brief at 22-25. In *Harris*, this Court held that since the rule of *Payton v. New York*, 445 U.S. 573 (1980), was designed to reflect the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," 495 U.S. at 17, no purpose would be served in excluding the statements Harris made after he was removed from the home.

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[2] At pages 16-18 of its brief, the United States points to the dicta in *Ramirez*, 523 U.S. at 71, suggesting that evidence might not have been suppressed even if the Court had concluded that the officers had engaged in excessive or unnecessary property destruction. But *Ramirez* plainly states that this suggestion might apply only so long as "the entry itself is lawful." *Id.* While it is not at all clear whether an entry becomes illegal if the police performing that entry also engage in unnecessary property destruction, *see id.* at 72 n.3 (declining to decide whether the evidence would have been suppressed had a violation occurred), it is beyond reasonable dispute from centuries of precedent that a knock and announce violation does make the entry illegal.

In relying on *Harris*, Respondent overlooks this key passage:

> [S]uppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. *The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been*; the purpose of the rule has thereby been vindicated.

Id. at 20 (emphasis added).

The point from *Harris*, then, is that a violation of the *Payton* rule, which is meant to protect the integrity of the home, should not result in the suppression of evidence obtained elsewhere. Petitioner therefore agrees that the knock and announce rule, which is also intended to protect the home, likewise should not result in the suppression of evidence obtained elsewhere. But *Harris* reaffirms that it is necessary to suppress evidence obtained from a home to vindicate a rule designed to protect the integrity of the home. *Harris* thus supports Petitioner's position.

3. Respondent's Rule Would Remove Much Police Activity from the Exclusionary Rule on a *Per Se* Basis.

This Court has unanimously rejected a *per se* rule that would have excised the entire class of felony drug investigations from the knock and announce rule. *Richards v. Wisconsin*, 520 U.S. 385 (1997). Respondent's proposed rule would go much further than the rule rejected in *Richards*.

Respondent's argument, if accepted, would completely exempt the knock and announce doctrine from the exclusionary rule.[3] It would also remove from the exclusionary rule, on a *per se* basis, all other claims that an entry was performed in an unconstitutional manner. *See* Respondent's Brief at 33.

Respondent makes clear, however, that it would not stop there. Respondent claims that if this Court accepts Petitioner's position, a variety of Fourth Amendment violations would result in automatic suppression of all evidence. Respondent's Brief at 24-27. In particular, Respondent maintains that Petitioner's argument would necessarily result in the suppression of all evidence found after: (1) a search that exceeds the scope of the warrant but produces evidence within the scope of the warrant; (2) an arrest achieved with excessive force; and (3) a search in which the officers permit the media to observe in violation of *Wilson v. Layne*, 526 U.S. 603 (1999).

Petitioner does not argue that all evidence obtained after such violations must necessarily be suppressed. On the contrary, Petitioner rejects such *per se* rules and agrees that the exclusionary rule must be applied only

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[3] Taking a slightly different tack, the United States concludes that exclusion would be appropriate for a knock and announce violation only for evidence "acquired as a direct consequence of the prematurity of the entry." Brief of United States at 19. The only example of such evidence is "excited utterances prompted by an unannounced, premature, or forceful entry." *Id.* at 20. Not surprisingly, the United States cites no cases in which defendants have sought to exclude such utterances prompted solely by the manner of entry, and Petitioner is aware of none. In practice, then, the rule advocated by the United States would also result in the *per se* admission of all evidence found after knock and announce violations.

when its deterrent purpose is served. While Respondent assumes that evidence found after such violations must always be admissible, this Court has never issued such a holding for any of these three types of violations. In fact, the lower courts have sometimes suppressed evidence found after such violations.[4]

Respondent's conclusion that the evidence the police find after these types of violations must always be admissible is consistent with Respondent's view that whole categories of Fourth Amendment activity are entirely beyond the reach of the exclusionary rule. Petitioner, by contrast, does not take the opposite position that all evidence found after all types of violations must be suppressed. In Petitioner's view, the test for determining whether evidence should generally be suppressed for each category of violation is the one the Court has used for many years: whether suppression is appropriate in light of the deterrence policies that underlie the exclusionary rule.

In the case of knock and announce violations, suppression of evidence found inside following such a violation is appropriate because it is necessary to deter officers from routinely violating the rule. Suppression of evidence found outside the home is not appropriate for the reasons set forth in *Harris*, and suppression of evidence found inside the home may be inappropriate if the evidence was the

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[4] *See, e.g., United States v. Foster*, 100 F.3d 846, 851-853 (10th Cir. 1996) (suppressing all evidence seized under warrant where officers grossly exceeded scope of warrant); *State v. Hodson*, 907 P.2d 1155, 1159 (Utah 1995) (suppressing evidence seized after officer used excessive force to perform arrest); *Thompson v. State*, 824 N.E.2d 1265, 1269-1271 (Ind. Ct. App. 2005) (suppressing evidence found by police during strip search which police permitted media to observe).

product of a source independent of the illegal entry or if the evidence inevitably would have been discovered through such an independent source.[5]

In short, Petitioner does not advocate a *per se* rule of exclusion even for knock and announce violations, much less a *per se* rule that would apply in other contexts. It is Respondent that advocates a *per se* rule that would remove much of the Fourth Amendment (and presumably many other constitutional protections as well) from the reach of the exclusionary rule.

In sum, Respondent's argument is impossible to square with *Miller*, *Sabbath*, and *Wilson*, each of which stands for the proposition that knock and announce violations produce illegal entries and, therefore, unreasonable searches and seizures inside the home. Respondent's arguments are not only inconsistent with this Court's knock and announce precedents but would also foreclose the possibility of evidentiary exclusion for a host of other Fourth Amendment and criminal procedure doctrines.

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[5] Thus, Petitioner does not maintain that evidence found through an overbroad search of a vehicle incident to arrest must be suppressed even if the prosecution can show that the car inevitably would have been impounded and subjected to an inventory search. *See* Respondent's Brief at 27-28. In such a situation, a reviewing court might well conclude that the inventory constitutes a process wholly independent of the illegal search that occurred. The reviewing court would still have to consider, as this Court did in *Nix*, whether failure to suppress would undermine the deterrence rationale if the officer who committed the violation knew that the evidence would always be regarded as inevitably discovered through inventory. But this example illustrates the difference between a defensible inevitable discovery argument where there actually is an independent source or process and an indefensible inevitable discovery argument, such as in the present case, where there is no independent source or process of any kind.

B. Application of the Exclusionary Rule Is Necessary To Deter Knock and Announce Violations.

Petitioner certainly agrees with Respondent that the "purpose of the exclusionary rule is to deter improper police conduct by denying the Government the fruit of that conduct." Respondent's Brief at 6.[6] It is surprising, therefore, that Respondent makes almost no effort to explain how police officers would be deterred from committing knock and announce violations in the absence of an exclusionary sanction. Respondent notes the possibility of civil litigation, *see* Respondent's Brief at 34 & n.66, while ignoring Petitioner's argument that such litigation is certain to be ineffective for an ordinary knock and announce violation because of the absence of tangible damages. It is telling that Respondent and its *amici* do not cite a single case where anyone has recovered actual damages solely for a knock and announce violation. If such cases exist, they must be exceedingly rare.

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[6] Respondent follows this statement with a historical review suggesting that the exclusionary rule is illegitimate. Respondent's Brief at 6-11. One of Respondent's *amici* questions whether the exclusionary rule deters police misconduct at all. *See* Brief of Criminal Justice Legal Foundation at 5 ("proving that the exclusionary rule actually does deter police misconduct may be impossible"). The exclusionary rule is a well-established feature of American law and there is substantial empirical research demonstrating that the exclusionary rule does deter police misconduct. *See, e.g.*, Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U.Colo.L.Rev. 75 (1992); Craig Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases:" The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J.Crim.L. & Criminology 1034 (1991); L. Paul Sutton, *"Getting Around the Fourth Amendment," in* Thinking About Police (Contemporary Readings) 433 (Carl B. Kockars & Stephen D. Mastrofski eds., 1991).

Indeed, Respondent concedes that in cases such as this one where officers violated the knock and announce rule without destroying the door, "damages may be virtually nonexistent." *Id.* at 35 n.66. *See also* Brief of Criminal Justice Legal Foundation at 10 (conceding that governmental immunities and the lack of alternative remedies "prevent substituting tort law for the exclusionary rule at this time").

The United States, by contrast, does argue the deterrence point. First, the United States claims that the possibility that someone might make an excited utterance solely because of the "prematurity of the entry" is enough to deter officers from violating the rule. Brief of United States at 23. The fact that the United States cannot cite one case where such an utterance has been made is sufficient to defeat a claim that such an unlikely eventuality is enough to deter violations of the rule.

Second, the United States claims that police will comply with the rule to protect themselves from being shot by residents who would not otherwise realize that it is the police coming through the door. Brief of United States at 24. But as the United States later observes, the officers in this case protected themselves "from being mistaken as unlawful intruders" by announcing their purpose and identity and then immediately barging in. *Id.* at 28. In other words, the United States is correct that in the absence of an exclusionary sanction officers might still announce before executing a search warrant in order to avoid being shot by mistake, *but they will not wait a reasonable time for a resident to open the door.* Thus, the police might observe that part of the rule that helps protect themselves, but the primary purpose of the rule is to affirm "the reverence of the law for the *individual*'s

right of privacy in his house." *Miller*, 357 U.S. at 313 (emphasis added). That primary purpose will not be served without an exclusionary sanction.

This case proves that point. Officer Good testified that he and the other officers announced their presence and then immediately proceeded to go through the door. When asked why he did not wait for anyone to answer the door, he responded, "It's a safety factor. I've been shot at numerous times going into drug houses. So it's a safety factor." J.A. 20. Officer Good was thus following precisely the type of *per se* rule excluding drug searches from the knock and announce rule that this Court had rejected one year earlier in *Richards*. There should be no serious question that police officers nationwide will routinely violate the knock and announce rule, just as Officer Good did, if this Court accepts Respondent's argument.

Finally, the United States claims that application of the exclusionary rule to knock and announce violations risks overdeterrence. *See* Brief of United States at 24. Yet the United States presents no support for the proposition that officers are overdeterred in the vast majority of jurisdictions that currently suppress evidence seized after knock and announce violations. *See* Petitioner's Brief at 16-17 (collecting cases from twenty-four jurisdictions). If officers have reasonable suspicion that complying with the knock and announce rule will endanger them or risk destruction of evidence, they may seek a no-knock warrant or simply dispense with the requirement at the scene. *Richards*, 520 U.S. at 394-396. But as this Court recognized in *Richards*, it is not too much to ask the officers to have such a reasonable suspicion before violating a venerable rule central to a citizen's right to privacy in his or her home. *See id.* at 394 (concluding that the reasonable

suspicion standard "strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and individual privacy interests affected by no-knock entries").

The availability of the exclusionary sanction is also necessary to assure compliance with the knock and announce rule because the rule will become a dead letter without it. If this Court adopts the *per se* rule currently in place in Michigan, criminal defendants nationwide will stop filing motions to suppress evidence seized after knock and announce violations, and the courts will almost never have occasion to decide whether knock and announce violations have occurred.[7]

At bottom, the arguments of Respondent and its *amici* betray a sharp disdain for the knock and announce rule itself. Respondent repeatedly argues that the only justification for suppression would be if the rule were intended to give defendants an opportunity to destroy evidence. Respondent's Brief at 3, 35-36. The United States attempts to downplay the importance of the knock and

[7] The United States argues, with a citation to *United States v. Leon*, 468 U.S. 897 (1984), that courts in criminal cases might continue to decide whether knock and announce violations occurred before rejecting suppression motions because of the unavailability of the exclusionary sanction. Brief of United States at 27-28 n.10. The United States thus misses the point that, unlike motions to suppress because of an alleged lack of probable cause in the warrant (which are still frequently filed after *Leon* because such motions can still succeed), motions to suppress because of knock and announce violations will *never* be filed if there is no possibility of excluding evidence seized after such violations. Therefore, even if trial judges in criminal cases were inclined to waste their time by deciding purely academic knock and announce questions, they will never have any occasion to do so if Respondent prevails.

announce rule by ubiquitously referring to violations of the rule as mere "premature entries." *See, e.g.*, Brief of United States at 6, 7, 12, 19; *see also id.* at 19 (arguing evidence should not be suppressed when "the only illegality that occurs during the execution of the warrant is the police's failure to wait a few additional moments after knocking and announcing before entering the premises"); *id.* at 29 ("violation consists solely of their having entered the residence a few seconds early").

Contrary to the suggestions of Respondent and the United States, the knock and announce rule is not a minor technicality designed to assist criminals in disposing of their incriminating evidence. The rule, which dates back to the era of the Magna Carta, is based on "the reverence of the law for the individual's right of privacy in his house." *Miller*, 357 U.S. at 313. The rule is intended to protect residents from the shock and embarrassment that often follows a precipitous police entry and to allow residents a chance to prevent destruction of their property. *See Richards*, 520 U.S. at 393 n.5.

If this Court accepts Respondent's invitation to remove the knock and announce rule from the reach of the exclusionary rule, it is a certainty that police officers nationwide will routinely do as Officer Good and his fellow officers did in this case. They will flagrantly disregard a venerable doctrine that is a core part of the right of the people to be secure in their homes. This Court has already recognized that the *per se* exemption of certain categories of criminal investigation would have made the knock and announce requirement "meaningless." *Id.* at 394. If all violations of the knock and announce rule are to be categorically exempted from the exclusionary sanction, it

"might as well be stricken from the Constitution." *Weeks v. United States*, 232 U.S. 383, 393 (1914).

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed, and the case should be remanded to that court with instructions to reverse Petitioner's conviction.

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No. 04-1360

In the Supreme Court of the United States

BOOKER T. HUDSON, JR., PETITIONER

v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether evidence seized pursuant to a valid search warrant must be suppressed because the officers who executed the warrant violated the Fourth Amendment's knock-and-announce requirement.

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INTEREST OF THE UNITED STATES

This case presents the question whether evidence seized pursuant to a valid search warrant must be suppressed when the police executing the warrant enter without complying with the Fourth Amendment knock-and-announce rule, but the evidence seized would have been discovered even if they had complied with the rule. Because the Court's resolution of that question will affect the admissibility of evidence offered in federal criminal prosecutions, the United States has a substantial interest in this case.

STATEMENT

1. At 3:35 p.m. on August 27, 1998, approximately seven Detroit police officers executed a search warrant for narcotics and weapons at petitioner's house. Officer Jamal Good testified that he neither saw nor heard any activity inside the house—a single family dwelling—as he and the other officers approached. Some of the officers shouted "police, search warrant" upon their arrival. After waiting three to five seconds, Officer Good turned the knob on the door, and the officers entered the house. Officer Good was a 14-year veteran of the Detroit Police force with six years of experience in the Narcotics Division. He testified that his entry was prompted by concerns for his safety, explaining that he had been shot at numerous times when executing narcotics search warrants. J.A. 4-5, 7-8, 19-20; 10/10/00 Tr. 10-16; 10/22/02 Tr. 5-9, 15-16.

Immediately upon entering the house, Officer Good saw petitioner seated on a chair in the living room. At least five other men and women were found running throughout the house. During the subsequent search, the police found on the chair in which petitioner had been sitting a plastic bag containing 23 individual zip-lock bags, each containing crack cocaine. They also discovered a loaded revolver protruding from between the cushion and armrest of the chair, as well as five rocks of cocaine weighing less than 25 grams and $225

cash inside petitioner's pants pockets. In addition, the police found a plastic bag on the living room coffee table containing two smaller baggies, each of which held 24 zip-lock bags of cocaine. J.A. 5-8, 17-20, 22; 10/22/02 Tr. 6, 9, 12-13, 17, 31, 33-39, 58-59; 10/23/02 Tr. 40-44.

2. Petitioner was charged with possession of less than 50 grams of cocaine with intent to deliver, in violation of Mich. Comp. Laws Ann. § 333.7401(2)(a)(iv) (West 2001), and possession of a firearm during the commission of a felony, in violation of Mich. Comp. Laws Ann. § 750.227b (West 2004). Petitioner moved to suppress the evidence, claiming, *inter alia*, that the police had violated the knock-and-announce requirement under the Fourth and Fourteenth Amendments, and that the evidence derived from the search should therefore be suppressed. J.A. 9-12.

At the evidentiary hearing, the prosecutor conceded, in light of Officer Good's testimony, that the police had violated the knock-and-announce requirement by waiting only three to five seconds before entering petitioner's home. The trial judge granted petitioner's motion to suppress. Pet. App. 9-10.

The State filed an interlocutory appeal, arguing that suppression was improper in light of the Michigan Supreme Court's decisions in *People* v. *Stevens*, 597 N.W.2d 53 (1999), cert. denied, 528 U.S. 1164 (2000), and *People* v. *Vasquez*, 602 N.W.2d 376 (1999), which held that the inevitable discovery doctrine of *Nix* v. *Williams*, 467 U.S. 431 (1984), generally rendered suppression inappropriate when officers failed to comply with the Fourth Amendment knock-and-announce requirement in making their entry to execute a valid warrant.

On May 1, 2001, the Michigan Court of Appeals reversed the suppression order, based on the decisions in *Stevens* and *Vasquez*. Pet. App. 4. Petitioner filed an application for leave to appeal to the Michigan Supreme Court. On December 18, 2001, the Michigan Supreme Court denied the application, reaffirming its decisions in *Stevens* and *Vasquez*. *Id*. at 5.

3. Following a bench trial on October 25, 2003, petitioner was convicted of possession of less than 25 grams of cocaine, and acquitted of the firearm charge. He was sentenced to 18 months of probation. J.A. 21-24.

Petitioner appealed his conviction, again arguing that the evidence seized in the warrant-authorized search should be suppressed because of the knock-and-announce violation. On June 17, 2004, the Michigan Court of Appeals affirmed petitioner's conviction, Pet. App. 1-2, and the Michigan Supreme Court subsequently denied his application for leave to appeal, *id.* at 3.

SUMMARY OF ARGUMENT

Because the exclusionary rule imposes significant costs on society by preventing the use at trial of reliable, probative evidence, the Court has carefully limited the rule's application to cases in which there is a significant causal connection between the discovery of evidence and the illegality. While the Court has articulated various doctrines—inevitable discovery, independent source, and rules that identify the "fruit of the poisonous tree"—to describe different ways in which a violation should not lead to suppression, they all reflect the principle that suppression is too high a price to pay for a particular violation when the causal link between the violation and the acquisition of evidence is weak, non-existent, or irrelevant to exclusionary-rule policies.

Such causation is completely lacking here. When officers seize evidence pursuant to a lawful warrant, the evidence is the product of the warrant, rather than the product of the unreasonable manner in which the police effected entry to execute the warrant. The warrant represents a judicial command that the officers search for and seize the evidence described in the warrant, and there is no dispute that the officers in this case would have lawfully entered petitioner's residence and discovered the same evidence if they had delayed

entry for the additional moments required by the knock-and-announce rule.

The evidence seized under warrant is therefore not the fruit of the particular government conduct that violated the Fourth Amendment, and suppression is therefore inappropriate. Indeed, application of the exclusionary rule in this context would put the government in a "*worse* position than it would otherwise have occupied" absent the illegality, contrary to this Court's express limitation on the exclusionary rule in *Murray* v. *United States*, 487 U.S. 533, 542 (1988) (emphasis added).

That conclusion is particularly clear given that the only claim of illegality asserted by petitioner involves the *manner* in which the officers executed the search warrant. Suppression of all the evidence is a mismatch because petitioner's Fourth Amendment interest here is not, as in a case involving the warrant or probable-cause requirements, in the items to be seized, but in the manner in which entry is achieved. This and other courts have repeatedly indicated that suppression is not an appropriate remedy for every illegality that might occur in the execution of a search warrant. Indeed, the Court has twice held that an initial illegal entry does not justify suppression of evidence subsequently seized pursuant to a valid warrant. See *Murray*, 487 U.S. at 536-541; *Segura* v. *United States*, 468 U.S. 796, 804 (1984).

Petitioner's assertion that, absent suppression of all of the fruits of the search, police will routinely ignore the knock-and-announce rule is mistaken. Not only does that view inappropriately presume the bad faith of police officers, but suppression remains an appropriate remedy if a knock-and-announce violation itself produces the discovery of evidence—for example, a statement of a startled occupant. And, absent legitimate concerns over safety or destruction of evidence, the risk that occupants may mistake the police for intruders gives the police ample incentives to announce their

identity and purpose and wait a reasonable period of time for an occupant to answer the door. In addition, there remain significant alternative remedies for constitutional violations, such as liability under 42 U.S.C. 1983 and the doctrine of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or criminal sanctions, as well as non-judicial remedies, such as the possibility of departmental discipline.

In any event, this Court has never permitted a desire for greater deterrence of police misconduct to take precedence over the universal requirement that evidence sought to be suppressed must be causally connected to the illegality. Especially where, as here, the claim of illegality goes only to the manner of executing the search, this Court's cases make clear that suppression of *all* evidence obtained during the warrant-authorized search would be a disproportionately severe remedy.

ARGUMENT

SUPPRESSION OF EVIDENCE IS NOT AN APPROPRIATE REMEDY FOR A KNOCK-AND-ANNOUNCE VIOLATION WHERE THE EVIDENCE WAS SEIZED PURSUANT TO A VALID WARRANT AND WOULD HAVE BEEN DISCOVERED EVEN IF THE OFFICERS HAD DELAYED ENTRY INTO THE PREMISES

The manner in which a search or seizure occurs is governed by the reasonableness requirement of the Fourth Amendment. See *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998); *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). In *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995), this Court held that the common-law requirement that officers announce their identity and purpose before entering a home to execute a search forms part of the Fourth Amendment inquiry into the reasonableness of the officers' entry.

Unlike other Fourth Amendment requirements, such as the warrant and probable-cause requirements, the knock-and-announce rule does not protect against improper government discovery or seizure of personal items. Rather, the rule serves three narrower interests. First, it protects "the individual privacy interests intruded upon by a no-knock entry." *Richards* v. *Wisconsin*, 520 U.S. 385, 393 (1997). Although the search or arrest warrant itself justifies a significant intrusion on the occupants' privacy interests, an announcement before entry tempers the suddenness of the invasion of privacy. See *id.* at 393 n.5. Second, a prior announcement protects officers from the possibility that occupants will take violent defensive action based on the mistaken assumption that a criminal intruder is at the door. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968). Third, a knock before entry prevents needless damage to the door of the home by giving occupants an opportunity to admit the officers peacefully. *Miller* v. *United States*, 357 U.S. 301, 307-308, 313 (1958).[1]

In light of the State's concession, this case proceeds on the assumption that petitioner's Fourth Amendment rights were violated by the officers' early entry into his residence to effectuate the search warrant. It does not follow, however, that the premature entry requires suppression of the evidence that was seized pursuant to the warrant. As noted, petitioner's interest in avoiding improper government seizure of his personal items is *not* among the Fourth Amendment interests protected by the knock-and-announce rule, especially in the context of a search supported by a lawful warrant.

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[1] *Wilson* made clear that the knock-and-announce principle is not an absolute requirement, but may be overcome by "countervailing law enforcement interests." 514 U.S. at 934; *id.* at 935-936 (noting "presumption in favor of announcement" could be overcome where, *inter alia*, officers face "a threat of physical violence" or "have reason to believe that evidence would likely be destroyed if advance notice were given"); accord *Richards*, 520 U.S. at 394; *Ramirez*, 523 U.S. at 67-68 (applying *Richards*'s reasonable-suspicion standard to cases where no-knock entry results in property destruction).

A. Failure To Comply With The Knock-And-Announce Rule Does Not Require Suppression Of Evidence Seized Under The Warrant Because Such Evidence Is Not The Fruit Of The Premature Entry

The exclusionary rule requires suppression only when evidence is acquired *as a consequence* of unlawful conduct. When officers seize evidence pursuant to a lawful warrant, the evidence seized is the fruit of the warrant, rather than the fruit of the unreasonable manner in which the police effected entry. Because the evidence seized under warrant is not the product of the particular government conduct that violated the Fourth Amendment, the exclusionary rule is not an appropriate remedy.

1. The Court Has Carefully Limited Application Of The Exclusionary Rule To Those Instances Where It Is Most Likely To Accomplish Its Remedial Aims Without Imposing Undue Costs

This Court has repeatedly recognized that the exclusionary rule imposes significant costs on society by preventing the use at trial of reliable, probative evidence, thereby allowing culpable defendants to go free.[2] The Court has also

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[2] The Court has recognized, for example, that there is a compelling "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969); see *United States* v. *Payner*, 447 U.S. 727, 734 (1980) ("Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury."). The exclusionary rule, if not properly limited, threatens to undermine this interest by allowing "[t]he criminal * * * to go free because the constable has blundered." *Nix* v. *Williams*, 467 U.S. 431, 447 (1984). It also can give rise to a public perception of unfairness that can have the "effect of generating disrespect for the law and administration of justice." *Stone* v. *Powell*, 428 U.S. 465, 491 (1976). See generally *United States* v. *Leon*, 468 U.S. 897, 907-908 (1984); *Illinois* v. *Gates*, 462 U.S. at 254-261 (White, J., concurring in the judgment).

emphasized that the exclusionary rule is a "remedial device," and that as such, its application "has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974); *Illinois* v. *Gates*, 462 U.S. 213, 257 (1983) (White, J., concurring in the judgment) ("[E]xclusion of evidence is not a personal constitutional right but a remedy, which, like all remedies, must be sensitive to the costs and benefits of its imposition.").

For these reasons, the exclusionary rule generally has been invoked only to suppress "[e]vidence obtained as a *direct result* of an unconstitutional search or seizure." *Segura* v. *United States*, 468 U.S. 796, 804 (1984) (emphasis added); see, *e.g.*, *Arizona* v. *Hicks*, 480 U.S. 321 (1987); *United States* v. *Chadwick*, 433 U.S. 1 (1977); *Chimel* v. *California*, 395 U.S. 752 (1969); *Katz* v. *United States*, 389 U.S. 347 (1967); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Weeks* v. *United States*, 232 U.S. 383 (1914). In addition, evidence that is obtained through exploitation of the prior illegality may be subject to suppression as the "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). In order for evidence to be considered a "fruit" of the illegality, however, there must necessarily be a causal connection between the evidence the government is seeking to introduce and the relevant illegality. Put another way, suppression is appropriate only if "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). The test for determining whether evidence is the "fruit" of a prior illegality is whether it was "come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 488 (citation omitted); see *Rawlings* v.

Kentucky, 448 U.S. 98, 106-110 (1980); *United States* v. *Ceccolini*, 435 U.S. 268, 274 (1978).[3]

As this Court's cases have made clear, evidence is not a "fruit" of a constitutional violation if it was, or inevitably would have been, obtained irrespective of the constitutional violation. As the Court explained in *Murray* v. *United States*:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, *not a worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

487 U.S. 533, 537 (1988) (emphasis added) (quoting *Nix* v. *Williams*, 467 U.S. 431, 443 (1984)); see *id.* at 542 ("[W]hile the government should not profit from its illegal activity, *neither should it be placed in a worse position than it would otherwise have occupied*" absent the illegality.) (emphasis added). Thus, suppression is not appropriate when the Fourth Amendment violation does not place the government

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[3] Petitioner mistakenly asserts (Pet. Br. 11) that *Wong Sun* and *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 390-392 (1920), stand for the proposition that "any kind of evidence found inside private premises following a police entry that is illegal for any reason is inadmissible." Those decisions stand only for the familiar principle that the direct and indirect fruits of an illegal arrest or search should be suppressed when they bear a sufficiently close causal connection to the underlying illegality. *Wong Sun* treated as an "illegal arrest" one in which the police lacked probable cause to detain the suspect; *Silverthorne* treated as an "illegal search" one in which the police searched the defendant's home in the absence of a warrant. In both cases, evidence acquired as a result of the illegal arrest (*Wong Sun*) and illegal search (*Silverthorne*), was a "fruit" of the illegality. In this case, by contrast, the entry and search were made pursuant to a warrant and thus were not "illegal" in the sense used by either of those cases.

in any better position with regard to the discovery of evidence than it would have occupied if the police had complied with the Constitution. See *id.* at 541.

The Court has consistently applied the principles limiting the fruits doctrine to bar the suppression of evidence when it has determined that the receipt of evidence was not "caused" by the particular illegality. In *United States* v. *Crews*, *supra*, a robbery victim identified her assailant after he was arrested without probable cause. The Court assumed that the post-arrest identification should be suppressed, but it refused to suppress the victim's later in-court identification of her assailant as the fruit of the defendant's illegal arrest. The Court noted that the victim came forward before the arrest occurred, and therefore her presence at trial was not traceable to the Fourth Amendment violation. Suppression was inappropriate, the Court held, because "the Fourth Amendment violation * * * yielded nothing of evidentiary value that the police did not already have in their grasp." 445 U.S. at 475. The Court therefore found, as a threshold matter, that the in-court identification was not "'come at by exploitation' of * * * the defendant's Fourth Amendment rights." *Id.* at 471 (quoting *Wong Sun*, 371 U.S. at 488).

In *New York* v. *Harris*, 495 U.S. 14 (1990), the Court relied on *Crews* to reach a similar result. The defendant in *Harris* was arrested in his home. The arresting officers had probable cause to arrest him, but they did not comply with *Payton* v. *New York*, 445 U.S. 573 (1980), which generally requires a warrant to arrest a suspect in his home. After being taken from his home, the defendant made an incriminating statement at the station house. The Court held that the station-house statement was not a fruit of the *Payton* violation. The Court noted that Harris was not "unlawfully in custody" while he was detained at the station house, because "the officers had probable cause to arrest [him] for a crime." 495 U.S. at 18. Emphasizing that the penalties imposed for offi-

cers' violation of the law "must bear some relation to the purposes which the law is to serve," *id.* at 17 (quoting *Ceccolini*, 435 U.S. at 279), the Court concluded that Harris's station-house statement should not be suppressed because it was not "the fruit of having been arrested in the home rather than someplace else." *Id.* at 19.

The Court has at least twice applied related causation principles to refuse to suppress evidence seized under warrant. In *Segura*, *supra*, police illegally entered an apartment without a search warrant and stayed there for 19 hours securing the premises. The next day, the police obtained a valid warrant and searched the apartment, seizing evidence, including narcotics. The Court noted that because the affidavit supporting the search warrant contained no information deriving from the illegal entry, the illegal entry "did not contribute in any way to discovery of the evidence seized" and the evidence was not "the product of illegal governmental activity." 468 U.S. at 815 (quoting *Crews*, 445 U.S. at 471); *id.* at 814 (holding that "legality of the initial entry is * * * wholly irrelevant" to admissibility of evidence seized pursuant to a valid warrant).

Likewise, in *Murray*, *supra*, officers first observed evidence during an illegal, warrantless entry into a warehouse. They later obtained a search warrant, searched the warehouse, and obtained that evidence. The Court noted that the affidavit seeking the warrant had included no information gleaned during the initial entry, and that the decision to obtain that warrant was unaffected by the illegal entry. As in *Segura*, the Court held that the evidence had an "independent source"—the search pursuant to the warrant—and determined that it should not be suppressed. "[W]hile the government should not profit from its illegal activity," the Court emphasized, "neither should it be placed in a worse position than it would otherwise have occupied" absent the illegality. 487 U.S. at 542.

Finally, in *Nix* v. *Williams*, 467 U.S. 431 (1984), the Court declined to apply the exclusionary rule to suppress the body of a victim to which the police had been led through an improperly obtained statement of the defendant, when the body would have inevitably been discovered by a then-ongoing search. The Court emphasized that even if the discovery of evidence is "*in some sense*" a product of government activity, the exclusionary rule's purposes would not be served when the evidence would have been acquired any way by lawful means. *Id.* at 444-448 (quoting *Crews*, 445 U.S. at 471) (emphasis added in *Nix*).

While the various doctrines—inevitable discovery, independent source, and the causation rules—describe different ways in which a violation should not lead to suppression, they all reflect the principle that suppression is too high a price to pay for a particular violation when the causal link between the violation and the acquisition of evidence is weak, non-existent, or irrelevant to exclusionary-rule policies. That is the case when, notwithstanding an antecedent violation, evidence is, or inevitably would have been, acquired pursuant to a valid and untainted search warrant.

2. *A Premature Entry Is Not Causally Related To The Seizure Of Evidence Pursuant To The Warrant*

Causation is equally lacking, and suppression inappropriate, where the sole defect in a warrant-authorized search is the failure of the police to comply with the knock-and-announce requirement. In such cases, it is not the premature or unannounced nature of the entry that leads to the discovery of evidence within a home. It is the fact that the police have a judicially authorized warrant supported by probable cause that authorizes them to seize that evidence. The seized evidence is therefore not the "product" of the prior Fourth Amendment violation (the premature entry); rather, it is the product of the warrant-authorized search.

Under this Court's cases, the exclusionary rule should therefore not apply. There is no dispute in this case that the officers had the authority to search for and seize the evidence in question. The only complaint is about the *manner* in which they executed the warrant, *i.e.*, by entering prematurely. Because the prematurity of the entry into petitioner's residence "did not contribute in any way to discovery of the evidence seized under the warrant," not even the threshold "'but for' requirement" for the "fruits" doctrine was met in this case. *Segura*, 468 U.S. at 815 (citation omitted); see *Harris*, 495 U.S. at 19. Nor is there any dispute that had the police complied with the knock-and-announce requirement—had the illegality never occurred—the officers would have inevitably discovered the same evidence. See *United States* v. *Langford*, 314 F.3d 892, 894 (7th Cir. 2002) ("[I]t is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant.") (citation omitted), cert. denied 540 U.S. 1075 (2003). The conclusion that the evidence should not be suppressed thus follows both from this Court's cases—such as *Crews*, *Harris*, *Segura*, and *Murray*—requiring that the challenged evidence be shown to be a "product" of the illegality, and from the inevitable-discovery doctrine of *Nix*.

To exclude the evidence would "put the police in a *worse* position" than they would have occupied absent the knock-and-announce violation. *Nix*, 467 U.S. at 445.[4] The interest

[4] Petitioner argues (Pet. Br. 27-34) that the Michigan Supreme Court interpreted the "worse position" language in *Nix* in a fashion that would eviscerate the exclusionary rule, because it would allow the police—in any case in which probable cause existed—to argue that the evidence would have inevitably been discovered if they had behaved lawfully. But that reading of *Nix* is not required in order to conclude that it is the pre-existing judicial warrant that *commanded* the officers to search that made the discovery of the contraband inevitable once the officers arrived to execute the warrant. Even though the officers retained discretion in executing the warrant, see *Town of Castle Rock* v. *Gonzales*, 125 S. Ct. 2796, 2808 (2005), the warrant itself represents a judicial

of society in obtaining probative evidence in this context is particularly acute because, in cases involving knock-and-announce violations, the police by definition will have already obtained a search warrant from a neutral magistrate based on probable cause that a crime has been or is being committed, and will have carried out the command of that judicial warrant by searching for evidence of that criminal activity.[5]

Petitioner argues (Pet. Br. 22-27) that the independent-source and inevitable-discovery doctrines cannot save a warrant-authorized search that follows on the heels of a knock-and-announce violation because in such cases there is no wholly independent source for the seized evidence. It follows, he claims, that evidence seized during that search is the direct fruit of the illegal entry. He attempts to distinguish *Segura* and *Murray* on the ground that in those cases, there was one illegal search, followed by a second search that had both a legal warrant *and* a legal entry. Cf. *United States* v.

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directive to search the premises, see Mich. Comp. Laws Ann. § 780.654 (West 1998) (requiring that "search warrant shall be directed to the sheriff or any peace officer, *commanding* such officer to search the house, building, or other location or place, where any property or other thing for which he is required to search is believed to be concealed") (emphasis added). Cf. Fed. R. Crim. P. 41(e)(2) (stating that "warrant must command the officer to * * * execute the warrant").

[5] It is possible, of course, that had the officers in this case not made a premature entry after announcing their presence and purpose, persons inside the home who were alerted to the arrival of the police might have destroyed the drugs during the brief interval between the officers' announcement and their entry into petitioner's home. Petitioner does not rely upon that possibility as a basis for arguing that the evidence seized pursuant to the warrant was the "fruit" of the early entry, nor could he. In *Segura*, this Court rejected the analogous claim that, because Segura could have destroyed drug evidence during the hours that the police unlawfully secured his apartment from the inside, the unlawful entry caused discovery of the evidence. The premise of that claim, the Court stated, "is that there is some 'constitutional right' to destroy evidence. This concept defies both logic and common sense." 468 U.S. at 816.

Dice, 200 F.3d 978, 985 (6th Cir. 2000) (*Murray* and *Segura* "involved a *second search* pursuant to a valid warrant, and that second search was independent of the illegal initial search."); *United States* v. *Marts*, 986 F.2d 1216, 1220 (8th Cir. 1993) (same).

As an initial matter, petitioner is mistaken about *Segura*. Although that case involved two searches, it, like this case, involved only a single (and defective) entry. See 468 U.S. at 819 (Stevens, J., dissenting) (noting that the agents that had illegally entered and remained inside to secure the apartment conducted the warrant-authorized search once they were notified that the warrant had issued). Petitioner's argument that an unlawful entry necessarily taints any search conducted following that entry is therefore flatly inconsistent with *Segura*, which found the "legality of the initial entry" to be "wholly irrelevant" to the admissibility of evidence seized pursuant to a valid warrant. *Id.* at 814.

Petitioner's argument also misperceives the relevant inquiry. The warrant-authorized searches in both *Segura* and *Murray* provided an independent source for the seizure of the evidence because the warrants were not based on any information acquired as a result of the initial illegal entries. But when the only alleged violation is a premature entry in the execution of a previously obtained, otherwise valid warrant, it is beyond dispute that the warrant is not based on any evidence acquired as a result of the unlawful manner in which the officers gained entry. The facts concerning entry do not somehow work to deprive the warrant of its status as an independent, untainted basis for the search. Thus, the previously issued warrant furnishes an independent basis for the search that cannot be tainted by the subsequent unreasonable entry.

Petitioner's argument also fails to focus on the precise nature of the alleged violation. Although there was only one "search" of petitioner's home, the search itself—which was conducted pursuant to a valid warrant—was not unlawful.

Nor was the entry into petitioner's home unauthorized. The only aspect of the police officers' conduct that was unlawful was their failure to wait for a brief additional period before entering, and petitioner makes no claim that the premature entry itself resulted in the discovery of any evidence.

It is more than a little anomalous to suggest that police, as in *Segura* and *Murray*, may validly seize evidence pursuant to an untainted warrant when the earlier illegality is the greater one of entering a residence in the absence of any warrant at all, but they may not validly seize evidence pursuant to an untainted warrant when the antecedent illegality is the lesser one of entering a few moments prematurely during the execution of a valid warrant. Neither precedent nor logic dictates such a result.

3. Violations Relating Only To The Manner Of Executing Warrants Do Not Require Suppression Of All Evidence Seized During the Warrant-Authorized Search

This and other courts have repeatedly indicated that suppression is not an appropriate remedy for every illegality that might occur in the *manner* in which officers execute a valid search warrant, especially where the Fourth Amendment's regulation of the manner of the search reflects interests distinct from the privacy interest in the underlying seized items. For instance, in *United States* v. *Ramirez*, 523 U.S. 65 (1998), this Court implicitly recognized that the failure to execute a search warrant in a reasonable manner does not inevitably lead to the suppression of any evidence; rather, suppression is warranted only if the evidence seized is the product of the particular illegality. There, as part of their entry into the home, police executing a "no-knock" warrant to search for drugs and guns broke a garage window and aimed a gun through the opening in order to discourage anyone from gaining access to weapons the police believed might be in the

garage. This Court rejected the court of appeals' conclusion that a higher level of exigency was required to justify a no-knock entry that results in such property damage. *Id.* at 71. But the Court did not hold that the police have carte blanche to destroy property during the execution of a warrant. Observing that the manner in which police execute a search warrant is governed by the "general touchstone of reasonableness which governs Fourth Amendment analysis," *ibid.*, the Court stated: "Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful *and the fruits of the search are not subject to suppression.*" *Ibid.* (emphasis added).[6]

Because the Court in *Ramirez* found that the officers in entering the premises had acted reasonably in breaking the garage window, the Court had no occasion to determine whether, if the officers had violated the Fourth Amendment in breaking the windows, the guns seized pursuant to the warrant should have been suppressed. The Court indicated, however, that suppression would not automatically follow as a result of such a Fourth Amendment violation, but rather would be warranted only if "there was sufficient causal rela-

[6] Petitioner argues (Pet. Br. 14) that, in making the observation that property destruction during the execution of a search warrant may violate the Fourth Amendment "*even though the entry itself is lawful* and the fruits of the search are not subject to suppression," the *Ramirez* Court was making a distinction, for purposes of the exclusionary rule, between unreasonable police conduct during the execution of a warrant and unreasonable police conduct while obtaining entry to execute the warrant. He suggests that if the police obtain entry in an unreasonable manner, everything seized during the subsequent search is subject to exclusion. But that reading of *Ramirez* is not sustainable. The point the Court was making was that if the police have a lawful right to enter—because they have a search warrant—evidence seized pursuant to the warrant is not subject to exclusion even though the police damage more property than was reasonably necessary in order to effectuate the entry *and* conduct the search. After all, the destruction of property at issue in *Ramirez* occurred *during the entry.*

tionship between the breaking of the window and the discovery of the guns." 523 U.S. at 72 n.3. Cf. *United States* v. *Folks*, 236 F.3d 384 (7th Cir.) (holding that regardless of reasonableness of using a distraction (flash-bang) device in connection with entry and search of residence, evidence was admissible because it inevitably would have been discovered during course of warrant-authorized search), cert. denied, 534 U.S. 830 (2001).

Similarly, in *Wilson* v. *Layne*, 526 U.S. 603 (1999), homeowners sued federal officers pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and state officers under 42 U.S.C. 1983, on the ground that the homeowners' Fourth Amendment rights were violated because police officers executing an arrest warrant at their home invited the media to accompany them. The Court held that such a "media ride-along" violated the Fourth Amendment but that the officers were entitled to the defense of qualified immunity because the law prohibiting such conduct was not clearly established at the time the search took place. In a footnote, the Court observed:

> Even though such actions might violate the Fourth Amendment, if the police are lawfully present, the violation of the Fourth Amendment is the presence of the media and not the presence of the police in the home. We have no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed *by the media representatives.*

526 U.S. at 614 n.2 (emphasis added). Implicit in this language is the recognition that evidence discovered *by the police* during the course of the arrest would not be subject to exclusion because there was nothing illegal about their presence in the home and no impairment of the warrant; rather, only evidence discovered or developed by the media would arguably

be subject to exclusion, because it was their presence that violated the Fourth Amendment.[7]

In addition, the courts of appeals have consistently held that items seized pursuant to a valid warrant are not to be excluded from evidence merely because the officers conducting the search also seized items not specified in the warrant. See, *e.g.*, *United States* v. *Sears*, 411 F.3d 1124, 1131 (9th Cir. 2005) ("Our case law on searches that exceed the terms of valid warrants also supports a remedy of partial suppression. 'Ordinarily, only evidence that is obtained in violation of a warrant is suppressed.'") (citation omitted); accord *United States* v. *Hamie*, 165 F.3d 80, 84 (1st Cir. 1999); *United States* v. *Jones*, 31 F.3d 1304, 1314 (4th Cir. 1994); *United States* v. *Heldt*, 668 F.2d 1238, 1259-1269 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978). And this Court has recognized the correctness of those decisions. See *Waller* v. *Georgia*, 467 U.S. 39, 43-44 n.3 (1984) (noting that because all items unlawfully seized during a warrant search were suppressed, "there is certainly no requirement that lawfully seized evidence be suppressed as well").

The result should be no different when the only illegality that occurs during the execution of the warrant is the police's failure to wait a few additional moments after knocking and announcing before entering the premises. When such a premature entry is the relevant Fourth Amendment violation, the remedy must respond to the defect in the manner of entry, and suppression only makes sense to the extent that evidence is acquired as a direct consequence of the prematurity of entry—for example, an utterance by a suspect made as police

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[7] At least one court has interpreted the footnote in this fashion. See *United States* v. *Hendrixson*, 234 F.3d 494, 496 (11th Cir. 2000) (relying on *Wilson* to hold that presence of media during execution of search warrant violated Fourth Amendment, but that evidence discovered by police was not subject to suppression), cert. denied, 534 U.S. 955 and 956 (2001).

enter but before they announce their identity that might not have been obtained by police had they announced their presence, or excited utterances prompted by an unannounced, premature, or forceful entry. The exclusionary rule does not, however, require suppression of the evidence seized pursuant to the warrant, because that evidence is not the fruit of the relevant Fourth Amendment violation.

4. Petitioner's Reliance On Cases Involving Searches Incident To Warrantless And Unlawful Arrests Is Misplaced

Petitioner mistakenly asserts (Pet. Br. 9-12) that this Court's decisions in *Miller* v. *United States*, 357 U.S. 301 (1958), and *Sabbath* v. *United States*, 391 U.S. 585 (1968), control the instant inquiry and require the suppression of evidence seized under a warrant following a knock-and-announce violation. In both of those cases, the police made *warrantless* entries into the defendants' homes in order to arrest them, without first announcing their presence and purpose, in violation of the federal knock-and-announce statute, 18 U.S.C. 3109.[8] Searches made incident to those arrests yielded contraband that was admitted into evidence at the defendants' trials. The Court held that the statutory violations rendered the arrests unlawful, requiring suppression of the evidence seized incident to the arrests. *Miller*, 357 U.S. at 313-314; *Sabbath*, 391 U.S. at 586.

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[8] Section 3109 states: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." The Court has noted that read literally the statute "prohibits nothing," but assumed arguendo in *Ramirez* that "the statute implicitly forbids some of what it does not expressly permit." 523 U.S. at 72. Likewise, although the statute refers only to search warrants, its criteria have been applied as well to the execution of arrest warrants. *Sabbath*, 391 U.S. at 588-589; *Miller*, 357 U.S. at 306; *Wong Sun*, 371 U.S. at 482-484.

As an initial matter, the Court's decisions in *Miller* and *Sabbath* were rendered at a time when the Court assumed that all federal violations of the law governing search and seizure required the suppression of all evidence seized. Since then, however, as explained above, see pp. 7-12, *supra*, the Court has made clear that, because of the high costs of the suppression of relevant and reliable evidence, the exclusionary rule should be applied only to the extent necessary to effectuate its purposes and only to the extent that seized evidence logically constitutes a fruit of a particular violation.

Moreover, the analysis employed by the Court in later cases demonstrates that a knock-and-announce violation, by itself, does not render an otherwise valid arrest illegal. *Miller* and *Sabbath* predated this Court's decision in *Payton*, *supra*, that a warrantless entry into a defendant's home to arrest him violated the Fourth Amendment. Rather, at the time *Miller* and *Sabbath* were decided, as the Court in *Miller* noted, the lawfulness of a warrantless arrest was governed by local law. In *Miller*, the local law governing warrantless arrests mirrored the requirements set forth in the federal knock-and-announce statute, 18 U.S.C. 3109; the search by federal officers in *Sabbath* was directly governed by 18 U.S.C. 3109. Because the Court found that the arrests in both cases did not comply with those requirements, it held that the warrantless arrests were illegal. After *Payton*, however, it is clear that if the police have a warrant, they may make a valid in-home arrest. A failure to comply with the knock-and-announce rule in that context would render unlawful only the manner of effecting entry; it would not render unlawful the arrest itself.

In any event, under contemporary doctrine as applied to the facts in *Miller* and *Sabbath*, the exclusion of evidence in those cases is consistent with the governing principle that the exclusionary rule should be applied only if the seized evidence constitutes a fruit of a particular violation. Because the officers in both *Miller* and *Sabbath* had no search warrant, the

government sought to admit the evidence in question pursuant to the search-incident-to-arrest doctrine. But, for evidence to be admissible under that doctrine, it "must be the product of a search incident to a *lawful* arrest." *Ker* v. *California*, 374 U.S. 23, 34 (1963) (emphasis added). Because the arrests in both *Miller* and *Sabbath* were illegal—under current law, because of the lack of a warrant—the suppressed evidence could plainly be said to be the fruit or product of those unlawful arrests.[9]

The same, however, cannot be said of evidence seized pursuant to a valid search warrant following a failure to comply with the knock-and-announce requirement. In that situation, the government is not seeking to introduce the evidence under a search-incident-to-arrest rationale, but as evidence seized pursuant to a valid warrant. The evidence is thus the fruit, not of an illegal arrest, but of a warrant authorizing its seizure.

B. The Court Should Not Abandon The Fundamental Requirement Of Causation In Order To Increase Deterrence Of Knock-And-Announce Violations

Petitioner contends (Pet. Br. 34-42) that, notwithstanding the well-established limitations on the exclusionary rule discussed above, suppression is necessary in this context in

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[9] This Court's decision in *Ker*, which also pre-dates *Payton*, is to the same effect. There, the Court upheld the admission of evidence seized by state officers following the warrantless arrests of the defendants inside their home. As in *Miller* and *Sabbath*, the admissibility of the evidence depended on whether it was the "product of a search incident to a lawful arrest, since the officers had no search warrant." As in *Miller* and *Sabbath*, the plurality in *Ker* looked to state law to determine the lawfulness of the warrantless arrests. 374 U.S. at 37-38. Because California's statute permitted officers to enter a home without notice when exigent circumstances were present, and the plurality found such exigent circumstances were present in that case, it found the arrests to be lawful under both California law and reasonable under Fourth Amendment standards. Accordingly, the searches were lawful because they were incident to lawful arrests. *Id.* at 38-43.

order to deter police from violating the knock-and-announce rule. According to petitioner, absent the remedy of suppression, police officers would routinely violate the knock-and-announce rule with impunity. Petitioner is mistaken.

1. Petitioner's premise—that knock-and-announce violations will never lead to the exclusion of evidence—is flawed: suppression remains available under settled remedial principles where the discovery of evidence is the product of the prematurity of the entry. For example, if the police enter without announcing their identity and purpose, someone inside might make an incriminating statement that he would not have made had he known that it was the police entering his home. Similarly, an immediate forcible entry might startle an incriminating statement from an occupant. See *Marts*, 986 F.2d at 1222 (Fagg, J., dissenting) (In the absence of an exclusionary remedy, police officers still have an incentive to comply with the knock-and-announce rule because they "know that any evidence seized as a direct result of the entry may be suppressed. * * * [O]fficers armed with a search warrant would be foolhardy to enter early in violation of [the knock-and-announce rule] because they have no way of knowing what they will see, hear, or learn when they enter."); accord *People* v. *Murphy*, 13 Cal. Rptr. 3d 269, 298-299 (Ct. App. 2004) (Benke, Acting P.J., dissenting) (noting situations in which evidence could be fruit of premature entry), review granted, 16 Cal. Rptr. 3d 330 (2004).

Petitioner's argument that absent the remedy of suppression the police will routinely ignore the knock-and-announce rule also rests on the flawed assumption that the police will deliberately violate this Court's decisions interpreting the Constitution. That assumption of bad faith is unwarranted, particularly in light of the practicalities of the situation. When police arrive at a residence to execute a search warrant, the magistrate has already authorized the seizure of the items named in the warrant. Where the police have no

reason to fear that anyone inside will respond with violence, the destruction of evidence, or an escape attempt, the police have ample incentives to announce their identity and purpose and wait for an occupant to come to the door to admit them: after all, an unannounced entry runs the very real risk that the occupants will take violent defensive action based on the mistaken assumption that the entering parties are criminal intruders. Indeed, this is one of the principal interests furthered by the knock-and-announce rule. See *Sabbath*, 391 U.S. at 589; *Miller*, 357 U.S. at 313 n.12.

Moreover, expansive application of the exclusionary rule in this context would risk overdeterrence. Underlying most failures to comply with the knock-and-announce rule is the officers' concern that substantial delay after announcement would endanger their safety or enable the suspects to destroy evidence or escape. See Kemal Alexander Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule—Part I*, 16 Search and Seizure L. Rep. 129, 129-130 (July 1989). Ensuring officer safety and preserving the very evidence whose seizure the warrant authorizes are plainly important and wholly legitimate law enforcement objectives. Dispensing with the requirement of causation and suppressing all the evidence found in the warrant-authorized search whenever officers' on-the-spot judgments miscalculate the exigencies of the situation might induce police officers to be unduly cautious in assessing how best to execute the warrant, at the possible expense of their safety and the preservation of the evidence to be seized under the warrant. See *Gates*, 462 U.S. at 258 ("It would be surprising if the suppression of evidence garnered in good faith, but by means later found to violate the Fourth Amendment, did not deter legitimate as well as unlawful police activities. To the extent the [exclusionary] rule operates to discourage police from reasonable and proper investigative actions, it hinders the solution

and even the prevention of crime.") (White, J., concurring in the judgment).

2. It is true that this Court has concluded that criminal remedies are inadequate as the sole means of safeguarding Fourth Amendment requirements. See *Mapp*, 367 U.S. at 651-653. Nevertheless, it is not irrelevant that, in addition to criminal remedies, judicial remedies for constitutional violations may be available through claims under 42 U.S.C. 1983 and the doctrine of *Bivens*, 403 U.S. at 397. See *Segura*, 468 U.S. at 812; see also *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations" and "the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity."); *Langford*, 314 F.3d at 894-895; *United States* v. *Sutton*, 336 F.3d 550, 552-553 (7th Cir. 2003). There are also non-judicial remedies that will continue to deter law enforcement officers from violating the knock-and-announce rule, such as the possibility of departmental discipline. See *Nix*, 467 U.S. at 446 ("Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct.") (citing *Bivens*, 403 U.S. at 397); *United States* v. *Payner*, 447 U.S. 727, 733-734 n.5 (1980) (refusing to assume that "lawless conduct, if brought to the attention of responsible officials, would not be dealt with appropriately" and concluding that "[t]o require in addition [to government discipline] the suppression of highly probative evidence * * * would penalize society unnecessarily").

But even if petitioner were correct about the role of the exclusionary rule in deterring knock-and-announce violations, that would not justify departing from the universal requirement of causation. This Court has never placed deterrence concerns above all others in administering the exclusionary

rule, but has instead balanced the rule's costs in a given situation against its deterrent effect. See *Payner*, 447 U.S. at 734. That approach has left some violations in certain instances undeterred. Thus, violations of the constitutional rights of one person that produce useful evidence only against other persons fall outside the scope of the rule, even though expansion of the exclusionary remedy to reach such violations could have additional deterrent effect. *Alderman* v. *United States*, 394 U.S. 165, 171-176 (1969); *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978); *United States* v. *Salvucci*, 448 U.S. 83, 95 (1980). Likewise, constitutional violations that produce evidence that independently is, or inevitably would have been, discovered anyway should not, the Court has held, result in the exclusion of that evidence. See *Murray*, 487 U.S. at 536-541; *Nix*, 467 U.S. at 444; see also *id.* at 452, 456-457 (Stevens, J., concurring in the judgment); *id.* at 459 (Brennan, J., dissenting). And the Court has applied the independent-source doctrine over the objection of dissenters that it would provide "an affirmative incentive to engage in unconstitutional violations of the privacy of the home." *Segura*, 468 U.S. at 817 (Stevens, J., dissenting); see *Murray*, 487 U.S. at 551 (Marshall, J., dissenting) (independent-source rule provides "an intolerable incentive for warrantless searches"). Indeed, it could be argued that officers who have initiated the process of obtaining a warrant based on existing information have *no* incentive to refrain from an immediate warrantless entry of the premises to be searched: if the warrant issues, the evidence would be admitted under the independent-source doctrine. Yet the Court's independent-source jurisprudence rejects this line of argument. See *Murray*, 487 U.S. at 539-540.

The same reasoning applies with particular force where the violation does not relate to the authority of the officers to conduct the search, but rather only to the manner in which they executed it. When the illegality relates to the authority of the police to search for and seize particular evidence, there

is a direct connection between the exclusionary rule, which denies the government the opportunity to exploit the inappropriately seized evidence against a defendant in a criminal trial, and the constitutional violation itself—the right of the defendant to keep his personal items secure from precisely such government search and seizure. But where, as here, the illegality relates only to the *manner* of executing a lawful warrant and there is no doubt as to the government's authority to seize and use the evidence in question, there is a poor fit between the remedy of suppression and the interests protected by the right violated. The knock-and-announce rule does not protect an individual from having the government search for and seize personal items that are covered by a valid warrant. It protects only interests in the way in which entry is achieved to conduct the search and seizure. There is therefore a logical disconnect between the nature of the violation and the extent of suppression sought. Suppression of evidence covered by a valid warrant because of a knock-and-announce violation makes no more sense than remedying a technical defect in an overbroad warrant by forcing the officers to pay for a door broken down when exigent circumstances justified the use of force. There are distinct Fourth Amendment interests and violations, and a suppression remedy that is appropriate when the underlying search is defective is disproportionate when the only Fourth Amendment problem is in the manner of entry. That disproportionality argues strongly against imposing on society "the considerable harm that would flow from indiscriminate application of an exclusionary rule." *Payner*, 447 U.S. at 734.[10]

[10] Petitioner suggests (Pet. Br. 40-42) that application of the inevitable discovery exception in this context would hinder development of Fourth Amendment law because courts generally would have no occasion to decide whether particular police conduct violated the knock-and-announce rule. The Court in *Leon* addressed a similar concern about application of the good-faith exception to the exclusionary rule by noting that "[t]here is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct mani-

C. Suppression Is A Disproportionately Severe Remedy On The Facts Of This Case

Exclusion of all the evidence seized pursuant to the warrant would be an especially harsh remedy given the nature of the violation in this case. The officers loudly announced their identity and their purpose before entering. They accomplished the entry by turning the knob and opening the door, causing no damage to any of petitioner's property. Plainly, then, the manner in which they entered fully protected two of the interests furthered by the knock-and-announce rule: safeguarding law enforcement officers from being mistaken as unlawful intruders, thus lessening the potential for violence, and avoiding needless property damage.

The knock-and-announce rule also serves the purpose of giving occupants the opportunity to prepare themselves for the entry. As the Court observed in *Richards* v. *Wisconsin*, 520 U.S. at 393 n.5, "[t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." Here, however, the immediate entry did not catch petitioner in an intimate or compromising moment. Rather, the officers immediately saw petitioner as they entered the house, sitting in a living room chair. Accordingly, given that the warrant authorized the far greater invasion of petitioner's privacy, the invasion into petitioner's privacy occasioned by the immediate entry in this case was minimal. See *United States* v. *Espinoza*, 256 F.3d 718, 725 (7th Cir. 2001) ("[T]he exclusionary rule should be limited only to those instances where

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fested objective good faith before turning to the question whether the Fourth Amendment has been violated." 468 U.S. at 924. Rather, "[i]f the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue." *Id.* at 925. Nothing would prohibit the courts from exercising a similar discretion in knock-and-announce cases.

the constitutional violation has caused actual harm to the interest * * * that the rights protect.") (internal quotation marks omitted), cert. denied, 534 U.S. 1105 (2002); *People* v. *Murphy*, 13 Cal. Rptr. 3d at 296 (Benke, Acting P.J., dissenting) ("[T]he right of privacy in this context is a limited one. In every announcement case the officers have the right to enter. Admittance may not be refused. As we use the term 'privacy' in such cases, the right is less ethereal and more practical, *i.e.*, allowing occupants to get out of bed or get dressed and thus see who is at the door.").

Where, as here, officers with a valid warrant have announced their presence and purpose, and the knock-and-announce violation consists solely of their having entered the residence a few seconds early, society's vital interest in combating crime should not be sacrificed by application of the exclusionary rule. As the Court observed in *Stone* v. *Powell*: "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the [exclusionary] rule is contrary to the idea of proportionality that is essential to the concept of justice." 428 U.S. 465, 490 (1976).

CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BOOKER T. HUDSON, JR.,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Michigan

BRIEF FOR THE CATO INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the inevitable discovery doctrine create a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, the Arkansas Supreme Court, and the Maryland Court of Appeals have held?

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BRIEF FOR THE CATO INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICI[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to restore the principles of limited constitutional government. The Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with this Court. The instant case addresses an important Fourth Amendment issue, and is thus of central concern to the Cato Institute and its Center for Constitutional Studies.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the fair administration of criminal justice. NACDL strives to defend the liberties guaranteed by the Bill of Rights and therefore has an interest in the important Fourth Amendment issues raised in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part. *Amicus* Cato Institute funded the preparation and submission of this brief with the financial support of a grant from the JEHT Foundation Trust, a nonprofit charitable institution incorporated under the laws of the State of New York that provides monetary assistance to organizations engaged in criminal justice reform.

STATEMENT OF THE CASE

On August 27, 1998, at approximately 3:35 p.m., several Detroit police officers arrived at the home of Petitioner Booker T. Hudson, Jr., to execute a search warrant for weapons and narcotics. Officer Jamal Good testified that he did not see or hear any activity in the home as he approached the door. Although Good announced "Police, search warrant," he did not knock on the door and did not wait for anyone to open the door. J.A. 19-20. Good waited three to five seconds before opening the door and entering "[r]eal fast." J.A. 19. After entering the home, Good saw Petitioner seated in the living room. Good ordered Petitioner to remain seated. After a sweep of the premises, Good returned to the living room and conducted a protective frisk of Petitioner. That search revealed five rocks of cocaine in Petitioner's pants pocket. J.A. 4-8.

Based on the evidence found in Petitioner's pants and other evidence obtained pursuant to the execution of the search warrant, Petitioner was charged with possession of cocaine with intent to deliver, possession of cocaine, and felony firearm. At the suppression hearing, the prosecutor conceded that the police entry into Petitioner's home violated the knock-and-announce requirement. Pet. App. 10. The trial court granted Petitioner's motion to suppress the evidence found on his person and in his home. Respondent then appealed to the Michigan Court of Appeals for peremptory reversal of the trial court's suppression order. Although Respondent conceded that the police entry of Petitioner's home "may have violated" the Fourth Amendment, J.A. 13, Respondent argued exclusion was an impermissible remedy under the Michigan Supreme Court's ruling in *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999).

Stevens held that evidence unlawfully obtained pursuant to a police violation of the knock-and-announce requirement is not subject to the exclusionary rule, provided the police

possess a valid search warrant and conduct a search of proper scope. Acknowledging that announcement is constitutionally mandated by *Wilson v. Arkansas*, 514 U.S. 927 (1995), and its progeny, *Stevens* explained that under this Court's cases "there has to be a causal relationship between the violation and the seizing of the evidence to warrant the sanction of suppression." 597 N.W.2d at 60. *Stevens* concluded that the inevitable discovery exception to the exclusionary rule was applicable where police violate the Fourth Amendment's announcement requirement. According to the court, the "exclusionary rule is not meant to put the prosecution in a worse position than if the police officer's improper conduct had not occurred, but, rather it is to prevent the prosecutor from being in a better position because of that conduct." *Id.* at 61, *quoting Nix v. Williams*, 467 U.S. 431, 443 (1984) (hereinafter *Williams II*). Because the police in *Stevens* had a valid warrant, the Michigan Supreme Court opined that "the evidence would have been discovered despite any police misconduct" and that there are state and federal "disincentives to deter police misconduct." *Id.* at 62.

The Michigan Court of Appeals granted Respondent's motion for peremptory reversal of the trial court's order suppressing the evidence found on Petitioner and in his home. That court ruled that *Stevens* and *People v. Vasquez*, 602 N.W.2d 376 (Mich. 1999) (*per curiam*) (reaffirming *Stevens*), did not authorize exclusion as an appropriate remedy for a knock-and-announce violation. Pet. App. 4. Petitioner filed an application for leave to appeal to the Michigan Supreme Court, but that application was denied. The Michigan Supreme Court reaffirmed its earlier holdings in *Stevens* and *Vasquez* that exclusion is not a proper remedy for a violation of the Fourth Amendment's announcement rule. Pet. App. 5.

Petitioner was then convicted in the trial court of possession of less than 25 grams of cocaine, based on the evidence discovered in his pants; he was acquitted of felony

firearm and possession of cocaine with intent to deliver. Petitioner was sentenced to 18 months probation. J.A. 21-24. Petitioner again appealed to the Michigan Court of Appeals, but that court affirmed his conviction based on the holdings in *Stevens* and *Vasquez*. Petitioner's application to the Michigan Supreme Court for leave to appeal the judgment of the Court of Appeals was denied. This Court granted certiorari to consider whether the inevitable discovery doctrine creates a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment knock-and-announce violation.

SUMMARY OF ARGUMENT

This case presents in unmistakable terms the question of constitutional remedy undecided in *Wilson v. Arkansas* and its progeny: whether and in what circumstances it is appropriate to exclude evidence seized in violation of the Fourth Amendment's knock-and-announcement requirement. The Michigan Supreme Court has held that the inevitable discovery doctrine authorizes a *per se* exception to the exclusionary rule for evidence illegally seized after a Fourth Amendment announcement violation. That judgment is inconsistent with the logic of this Court's knock-and-announce and exclusionary rule decisions.

According to the Michigan court's analysis, the violation of the announcement requirement "was independent of" the search and seizure that occurred in Petitioner's home. *Stevens*, 597 N.W.2d at 64. This analysis ignores *Wilson*'s holding that "the method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure." *Wilson*, 514 U.S. at 934. Because the police violated the announcement requirement, as conceded by Respondent below, the search and seizure inside Petitioner's home was unconstitutional under the Fourth Amendment. Thus, the courts below were wrong to suggest that the search of Petitioner and his home was causally disconnected from the announcement violation. The

correct analysis is provided by *Wilson*: the illegal entry into Petitioner's home unconstitutionally tainted the subsequent search and seizure that occurred inside.

Because *Wilson* and its progeny indisputably establish that the intrusion into and search of Petitioner's person and home was unconstitutional, the question here is whether the exclusionary rule is the proper remedy for an announcement violation. The argument against exclusion—at its core—is that Petitioner would find himself in the same position (because the evidence would have been found anyway) if the search had been properly announced. There are three reasons why this argument proves too much.

First, unless illegally obtained evidence is excluded, there will be no effective deterrent to future announcement violations in ordinary cases like Petitioner's. Common sense teaches that if exclusion is unavailable as a remedy for an announcement violation, officers will not comply with *Wilson* and its progeny. Affirming the judgment below would mean the evisceration—as a practical matter—of the constitutional protection announced in *Wilson*.

Second, the Michigan Supreme Court's analysis misunderstands the purpose of the exclusionary rule. Even assuming that the evidence found in Petitioner's pants would have been discovered had the police complied with the announcement requirement, that fact is irrelevant when determining whether exclusion is appropriate for a Fourth Amendment violation. This Court recognizes that the purpose of exclusion is to deter future violations of the Fourth Amendment; it has, moreover, repeatedly explained that the "wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's right which he has already suffered.'" *United States v. Leon*, 468 U.S. 897, 906 (1984) (citations omitted). If when determining the applicability of the exclusionary rule in a

particular case, this Court is unconcerned with "cur[ing] the invasion of the defendant's rights," *id.*, then it follows that the Court is equally unconcerned with what evidence might have been found had the police not violated the Constitution. Put simply, application of the exclusionary rule turns on deterrence, not on the evidence discovered by the police or the evidence lost because of suppression.[2]

Third, the Michigan Supreme Court's logic cannot be confined to this case. No principled line can be drawn that distinguishes application of the exclusionary rule to cases where the police have probable cause and sufficient time to secure a warrant but fail to do so from non-application of the rule to announcement cases. Applying the Michigan court's analysis to a factual scenario where the police could have secured a warrant, but conduct an illegal warrantless search anyway, would suggest that the warrant requirement itself need not be enforced by the exclusionary rule.

To be sure, the Court has recognized exceptions to the exclusionary rule in cases where an "independent source" for the same evidence exists or where the evidence would have been inevitably discovered. Neither exception applies here. To fall within either exception, the prosecution must show an independent, untainted source for the same evidence. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392

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[2] While this Court has firmly held that deterrence is the main rationale supporting application of the Fourth Amendment exclusionary rule, *amici* also believe that other rationales, recognized by some inferior courts applying state law analogues to the Fourth Amendment rule, may offer additional reasons to support exclusion under federal law. *See, e.g.*, Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 Harv. J.L. & Pub. Pol'y 711 (2000) (discussing additional rationales); *cf., e.g., State v. Hall*, 115 P.3d 908 (Or. 2005) (recognizing protection of expectation interests as a justification for applying state-law version of exclusionary rule). Nonetheless, *amici*'s argument below treats the deterrence rationale as the sole governing rationale for Fourth Amendment exclusion in this case.

(1920) (Holmes, J.) ("the knowledge gained by the Government's own wrong cannot" be the means for admitting the evidence). In other words, the constitutional violation itself can never be the "independent source" that justifies admitting the evidence.

This Court's subsequent cases applying the independent source and inevitable discovery exceptions have strictly adhered to this limitation. *Segura v. United States*, 468 U.S. 796 (1984), *Nix v. Williams*, 467 U.S. 431 (1984) (*Williams II*), and *Murray v. United States*, 487 U.S. 533 (1988), establish that the independent source and inevitable discovery exceptions authorize the admission of unlawfully obtained evidence only when lawful means, wholly independent of any constitutional violation, would have revealed the challenged evidence. When evidence is "derived from or related in any way to" an illegal entry and search, *Segura*, 468 U.S. at 814, it cannot be admitted under either of these exceptions. Respondent cannot prove that lawful means, independent of the illegal entry and search of Petitioner's home, were used to discover the evidence found in Petitioner's pants. To the contrary, there was only one intrusion in this case—and it was unreasonable under *Wilson* and its progeny; the inevitable discovery exception is unconcerned with speculation that police officers *might* or *could* have seized the same evidence properly if a different chain of events had occurred. Nor does police possession of a valid warrant change this result. As *Wilson* instructs, the search conducted pursuant to that warrant was tainted by the illegal entry.

Finally, the availability of the inevitable discovery exception does not depend upon whether the prosecution would be put in a worse position because of exclusion. Exclusion of incriminating evidence always puts the prosecution in a worse position than it would be in if there were no police misconduct. Exclusion was inappropriate in *Williams II* only because the challenged evidence had an independent source free

from the taint of the unconstitutional conduct that initially secured the evidence.

ARGUMENT

I. ANNOUNCEMENT IS A REQUISITE ELEMENT IN DETERMINING THE REASONABLENESS OF A POLICE ENTRY AND SUBSEQUENT SEARCH AND SEIZURE IN A PRIVATE DWELLING

Wilson v. Arkansas establishes that an unannounced police entry implicates the Fourth Amendment rights of a homeowner. *Wilson* ruled that the common-law principle of announcement "is an element of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 514 U.S. at 934. *Wilson* and its progeny do recognize that the "Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.* However, unless police have reasonable suspicion of exigent circumstances under the particular facts, officers have a constitutional "obligation," *United States v. Banks*, 540 U.S. 31, 35 (2003), to both announce their presence and purpose, *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997), and wait a reasonable period of time before effectuating a forcible entry into a private home. *Banks*, 540 U.S. at 43. After *Wilson*, the constitutional status of the announcement rule can no longer be questioned.[3] Law enforcement officers have no discretion

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[3] In *Miller v. United States*, 357 U.S. 301 (1958), and *Sabbath v. United States*, 391 U.S. 585 (1968), the Court focused upon the knock-and-announce requirements codified in 18 U.S.C. § 3109 to address the validity of the defendants' arrests. In both cases, the Court held that because officers did not announce their presence and purpose before entering the defendants' residences, the arrests of the defendants were illegal and the evidence seized incident to the arrests should have been suppressed. *Miller*, 357 U.S. at 313-14; *Sabbath*, 391 U.S. at 586. In *Ker v. California*, 374 U.S. 23 (1963) (plurality opinion), Justice Clark found that an unannounced police entry "was not unreasonable under the stand-

or privilege to ignore the announcement requirement, and judges must consider the manner of a police entry when determining the constitutional validity of a police search and seizure of private premises. *See Wilson*, 514 U.S. at 934 ("[T]he method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure.").

Despite the constitutional command established in *Wilson* and its progeny, Respondent and the Michigan Supreme Court have intimated that violation of the announcement requirement does not affect the reasonableness of a search and seizure in a home and does not jeopardize any significant Fourth Amendment interests of the Petitioner. Respondent, for example, has opined that the police conduct here simply involves "a 'timing' error with regard to entry." Resp. Ans. 8. Similarly, the Michigan Supreme Court has stated, referring to its statutory announcement requirement, that the knock-and-announce rule "does not control the execution of a valid warrant; rather it only delays entry." *Stevens*, 597 N.W. 2d at 63. Under this logic, the announcement requirement "was independent of" the search and seizure of evidence that occurred in Petitioner's home. *Id.* at 64.

These arguments are wrong. *Wilson* indisputably establishes that the intrusion into and search of Petitioner's person and home violated the Fourth Amendment.[4] As Respondent

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ards of the Fourth Amendment" because exigent circumstances arising under the particular facts of that case justified the entry. *Id.* at 40-41. The *Ker* plurality did not question the constitutional status of the announcement rule and the four dissenting Justices in *Ker* vigorously argued that the rule was firmly rooted in the Constitution. *Id.* at 47-59 (Brennan, J., dissenting in part). This Court granted certiorari in *Wilson* to resolve a conflict among the lower courts regarding whether the announcement rule was mandated by the Fourth Amendment.

[4] This Court has long recognized that the concept of reasonableness requires examination of the manner in which a search and seizure is

conceded below, the police violated the announcement requirement, and there were no exigent circumstances justifying failure to comply with that requirement. This is all that needs to be said regarding the constitutionality of the search of Petitioner's person and home.

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conducted. In *Ker*, officers entered the defendants' home unannounced, arrested the defendants and seized contraband in plain view. The defendants argued that the lawfulness of their arrests, "even if based upon probable cause, was vitiated by the method of entry." *Ker*, 374 U.S. at 37. Eight Justices in *Ker* did not question the proposition that the manner of a police entry into a home was directly linked to the constitutional reasonableness of a subsequent search or seizure in that home. Justice Clark's plurality opinion explained that "the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search." *Id.* at 38. The four dissenting Justices in *Ker* concluded that the arrests of the defendants were illegal "because the unannounced intrusion of the arresting officers into their apartment violated the Fourth Amendment." *Id.* at 47 (Brennan, J., dissenting in part). And because those arrests were illegal, the *Ker* dissent stated that the exclusionary rule requires suppression of the evidence found incident to the arrests. *Id.* *Wilson*'s holding, "that the method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure," *Wilson*, 514 U.S. at 934, extinguished any lingering doubt that existed after *Ker* as to "whether the lack of announcement might render a search unreasonable under other circumstances." *Id.* at 934 n.3. The constitutional principle established by *Wilson* and its progeny is clear: If the police fail to announce their presence and purpose before entering a private dwelling, and there are no exigent circumstances justifying an unannounced entry, the search and seizure inside the dwelling is *per se* unreasonable. *See also Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (explaining that reasonableness under the Fourth Amendment "depends on not only when a [search or] seizure is made, but also how it is carried out") (citations omitted).

II. EXCLUSION IS THE PROPER REMEDY FOR THE VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS

A. Exclusion Is Necessary To Enforce The Fourth Amendment

The police violated Petitioner's Fourth Amendment rights. Unless the Court is considering overruling *Wilson*, Respondent cannot now ask this Court to ignore the conceded violation of the announcement requirement in order to resolve this case. That being the case, the only question here is whether the exclusionary rule is the proper remedy. *Amici* respectfully submit that exclusion is indispensable: either the exclusionary rule is applicable in ordinary cases like this one or else the knock-and-announce requirement established in *Wilson* and its progeny becomes a dead-letter.

Stevens takes the view that exclusion in cases like Petitioner's is an inappropriate remedy for the constitutional violation. The argument against exclusion—at its core—is that Petitioner would find himself in the same position (because the evidence would have been found anyway) if the search had been properly executed. The flaw in this argument is that it proves too much.

First, unless illegally obtained evidence is excluded, there will be no effective deterrent to an announcement violation in an ordinary case like Petitioner's. Common sense teaches that if exclusion is never available as a remedy for violation of the announcement requirement, police officers will rarely, if ever, comply with the command of *Wilson* and its progeny. Officers executing a search or arrest warrant gain an indisputable practical advantage if they are not required to announce their entry. For example, when executing a search warrant for narcotics, "[d]rug enforcement authorities believe that safety for the police lies in a swift, surprising entry with overwhelming force—not in announcing their official author-

ity." Kemal Alexander Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule—Part I*, 16 Search & Seizure L. Rep. 129, 130 (1989). The facts of this case prove the point. Officer Good admitted that subjective concerns about his own safety motivated his conduct: He effectuated an immediate entry without waiting for anyone to open the door (in violation of *United States v. Banks*) because of such subjective concerns. *See* J.A. 20. Of course, as this Court recognized in *Banks*, Officer Good's subjective fears of danger were not legally sufficient to justify failing to knock on Petitioner's door and failing to wait a reasonable period of time before entering without permission. *Banks*, 540 U.S. at 43 ("Absent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one."). Accepting the judgment of the Michigan Supreme Court would mean the evisceration—as a practical matter—of the constitutional protection announced in *Wilson* and its progeny.

Moreover, the bald assertion that exclusion is not appropriate because tort liability or criminal sanctions authorized by federal and state law will serve as deterrents for the type of unconstitutional behavior seen here, *Stevens*, 597 N.W.2d at 64, ignores the holding of *Mapp v. Ohio*, 367 U.S. 643 (1961), and the many cases since *Mapp* where this Court has upheld state and federal court rulings imposing the exclusionary rule. *See, e.g., Arizona v. Hicks*, 480 U.S. 321 (1987); *United States v. Chadwick*, 433 U.S. 1 (1977). *Mapp* rejected the argument that suing or prosecuting police officers was a sufficient deterrent to prevent violations of the Fourth Amendment. *Mapp* noted that the experience of most states had indicated that "such remedies have been worthless and futile" in protecting Fourth Amendment freedoms. 367 U.S. at 652. Since *Mapp* was decided, this Court has not questioned the appropriateness of exclusion as the remedy for Fourth Amendment violations, notwithstanding the existence of other federal and state sanctions. *See Leon*, 468 U.S. at

908-09 ("The Court has, to be sure, not seriously questioned, 'in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate.'") (citations omitted). As this Court has repeatedly stated, the primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974). Without exclusion, in ordinary announcement cases, police officers will have no meaningful incentive to comply with *Wilson* and its progeny.

Second, according to the Michigan Supreme Court, exclusion is inappropriate because the incriminating evidence would have been found if the police had followed the law. This argument also proves too much and has no boundaries. As Justice Scalia noted in an analogous context, "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001).

One could assume that the crack cocaine located in Petitioner's pants would have been discovered had the police complied with the announcement requirement. But as nearly every search and seizure case decided by this Court demonstrates, that fact is irrelevant when deciding whether exclusion is appropriate for a Fourth Amendment violation. The exclusionary rule's purpose is to deter future Fourth Amendment violations. The applicability of the rule does not pivot on whether admitting (or suppressing) incriminating evidence in a particular case will facilitate the conviction of a guilty person. Instead, the rule is intended to protect all persons, the innocent and guilty alike, from future unlawful searches and seizures. *Cf. Hicks*, 480 U.S. at 329 ("[T]here is nothing new

in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."). This Court has repeatedly explained that the "wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's right which he has already suffered.'" *Leon*, 468 U.S. at 906 (citations omitted). If when determining the applicability of the exclusionary rule in a particular case, this Court is unconcerned with "cur[ing] the invasion of the defendant's rights," *id.*, then it follows that the Court is equally unconcerned with what evidence might have been found had the police not violated the Constitution. Simply stated, application of the exclusionary rule turns on deterrence, not on the evidence discovered by the police or the evidence lost because of suppression.

Not only is the logic of the Michigan court inconsistent with this Court's understanding of the purpose of the exclusionary rule, it also cannot be confined to ordinary announcement cases. The reasoning of *Stevens*—exclusion is inappropriate whenever incriminating evidence would have been found had the police properly announced their search—is equally applicable to other Fourth Amendment contexts. Consider, for example, the facts and result in *United States v. Chadwick*, 433 U.S. 1 (1977). There, police had probable cause that a 200-pound footlocker possessed by the defendants contained illegal narcotics. *Id.* at 3-4. Police arrested the defendants outside of South Station in Boston and seized the footlocker. *Id.* Immediately after the arrests, the footlocker remained under the exclusive control of law enforcement officials. *Id.* at 4. An hour and a half after the arrests, officers opened the footlocker at a federal building. *Id.* It was undisputed that no exigency existed requiring an immediate search. *Id.* at 4. And the officers did not have the defendants' consent, nor did they obtain a search warrant. *Id.*

at 4-5. A large amount of marijuana was found inside the footlocker. *Id.*

Writing for a majority of the Court, Chief Justice Burger held that the warrantless search of the footlocker violated the Fourth Amendment. The Chief Justice explained that because the defendants had important privacy interests in the footlocker, the Fourth Amendment's warrant requirement applied to the search of the footlocker. *Id.* at 7-11. Accordingly, the judgment of the Court of Appeals suppressing the marijuana found inside the footlocker was affirmed. *Id.* at 16. But using the logic of *Stevens*, exclusion was inappropriate in *Chadwick* because the defendants would have found themselves in the same position (because the evidence would have been found anyway) had the officers secured a warrant to open the footlocker. If this Court affirms the judgment below, no principled line can be drawn that distinguishes application of the exclusionary rule in a *Chadwick*-type case from non-application of the exclusionary rule in an announcement case. Applying the Michigan court's analysis to a fact pattern where the police have probable cause to secure a warrant, but conduct an illegal search anyway, would mean that the warrant requirement itself need not be enforced by the exclusionary rule.

Finally, there is no hierarchy of Fourth Amendment rights that justifies not applying the exclusionary rule in announcement cases. Failure to comply with the announcement requirement is no "technical" Fourth Amendment violation.[5] For purposes of applying the exclusionary rule, *Wilson*'s holding means that violations of the announcement requirement must be treated like violations of the warrant requirement in cases like *Chadwick* or *Payton v. New York*,

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[5] *Amici* agree with Justice Stevens that "there is no such thing as a 'technical' violation of the Fourth Amendment." *Leon*, 468 U.S. at 970 n.23 (opinion of Stevens, J.).

445 U.S. 573 (1980) (police must obtain an arrest warrant when entering a suspect's home to effectuate a routine arrest; irrelevant that police had sufficient evidence that would have authorized the issuance of an arrest warrant); or like violations of the search incident to arrest rule in cases like *Knowles v. Iowa*, 525 U.S. 113 (1998) ("search incident to citation" inconsistent with Fourth Amendment; immaterial that officer could have arrested defendant under state law and then conducted the same search that would have been allowed under this Court's search incident to arrest rulings); and like *Chimel v. California*, 395 U.S. 752 (1969) (extensive search of arrestee's home not authorized by search incident to arrest rule; irrelevant that police had sufficient evidence to support issuance of a search warrant that would have authorized the same extensive search); or like violations of this Court's investigative detention cases.

Terry v. Ohio, 392 U.S. 1 (1968), and its progeny also plainly demonstrate that there is no hierarchy of Fourth Amendment rights that controls application of the exclusionary rule. *Terry* upheld an investigative frisk for weapons, and in subsequent cases the Court has approved investigative searches and detentions that fall short of traditional arrests or full-blown searches. In allowing such investigative intrusions based on reasonable suspicion, the Court has explained that certain investigative techniques "constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Michigan v. Summers*, 452 U.S. 692, 699 (1981).

But when the police violate the strictures established in *Terry* and its progeny, this Court has never suggested that exclusion is an inappropriate remedy because the illegal detention or investigative search was less intrusive than an arrest or traditional search. On the contrary, the Court has

stated that "[i]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (citation omitted). It makes no difference that the text of the Fourth Amendment does not explicitly mandate the announcement rule. As Justice Scalia has noted, the text of the Amendment does not expressly mandate the warrant requirement either. *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in the judgment) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'"). What matters is that an unannounced entry without exigent circumstances is unreasonable under the Fourth Amendment's requirement of reasonable searches and seizures. Because the entry and search violated the Petitioner's Fourth Amendment rights, exclusion is the proper remedy.

B. The Independent Source And Inevitable Discovery Exceptions To The Exclusionary Rule Are Inapplicable To Petitioner's Case

1. The Independent Source And Inevitable Discovery Exceptions Forbid The Admission of Evidence Derived From A Constitutional Violation

Since *Weeks v. United States*, 232 U.S. 383 (1914), this Court has developed several exceptions to the Fourth Amendment's exclusionary rule. One such exception is the independent source rule, first articulated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). There, federal law enforcement officials illegally seized documents from the defendants' office. After the district court ordered the return of the original documents to the defendants, a grand jury subpoena was issued to produce the original documents. When the defendants refused to comply with the subpoena, they were held in contempt. This Court reversed

the contempt convictions and explained that a ruling for the government would reduce the Fourth Amendment "to a form of words." *Id.* at 392. According to Justice Holmes, "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* Justice Holmes then commented that the exclusionary rule did not make the facts learned from an illegal intrusion forever "sacred and inaccessible." *Id.* Rather, he noted that "[i]f knowledge of [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.*

The independent source exception envisioned in *Silverthorne* contains a built-in limitation. Evidence discovered from a constitutional violation may be admissible if the prosecution can show an independent source for the same evidence, "but the knowledge gained by the Government's own wrong cannot" be the means for admitting the evidence. In other words, the constitutional violation itself can never be the "independent source" that justifies admitting the evidence. This Court's later cases applying the independent source and inevitable discovery exceptions to the exclusionary rule—*Segura v. United States*, 468 U.S. 796 (1984); *Nix v. Williams*, 467 U.S. 431 (1984) (*Williams II*); and *Murray v. United States*, 487 U.S. 533 (1988)—have strictly adhered to this limitation.

In *Segura*, for example, law enforcement officers illegally entered the defendants' home and immediately observed incriminating evidence in plain view. The officers remained in the home until a search warrant was obtained. Nineteen hours later, officers conducted a search pursuant to a valid warrant and discovered additional incriminating evidence. The evidence that was discovered in plain view after the officers' illegal entry was suppressed by the lower court and

not addressed by this Court. *Segura*, 468 U.S. 802-03 & n.4. But this Court did hold that the evidence discovered pursuant to the valid search warrant was admissible under the independent source exception. *Segura*'s explanation on why the independent source rule applied to these facts is worth quoting in full:

> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of that search, wholly unrelated to the prior entry. The valid warrant search was a "means sufficiently distinguishable" to purse the evidence of any "taint" arising from the entry.

Id. at 814, *quoting Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

Similarly, in *Williams II*, incriminating statements obtained from Williams in violation of his Sixth Amendment right to counsel led police to the body of a murder victim. In *Williams I* (*Brewer v. Williams*, 430 U.S. 387 (1977)), the Court held that Williams' statements could not be used at trial. After Williams was retried and convicted again, the issue in *Williams II* was whether "evidence pertaining to the discovery and condition of the victim's body was properly admitted on the ground that it would ultimately or inevitably

have been discovered even if no violation of any constitutional or statutory provision had taken place." *Williams II*, 467 U.S. at 434. This Court ruled that the evidence related to the victim's body was admissible under an inevitable discovery exception to the exclusionary rule otherwise applicable to Sixth Amendment violations, but emphasized that the discovery must have been inevitable by lawful means, untainted by the unconstitutional conduct.

Before explaining why the challenged evidence was admissible under an inevitable discovery exception, *Williams II* reiterated the limitation stated in *Silverthorne* that the independent source exception only applies when the means used by the government to discover evidence are truly separate from any constitutional misconduct. *See id.* at 443 ("The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation."). The independent source exception was unavailable in *Williams II* because the unconstitutional questioning of Williams led police to the victim's body. *Id.* Therefore, because the challenged evidence "was derived from" and "the product of" and not "wholly unconnected" from that constitutional violation, *Segura*, 468 U.S. at 814, the prosecution could not prove an independent source for the evidence.

Although the evidence concerning the condition of the victim's body could not be admitted under the independent source exception, *Williams II* reasoned that an inevitable discovery exception might authorize the admission of evidence that would otherwise be subject to suppression. Like the independent source rule, the inevitable discovery exception "ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." *Williams II*, 467 U.S. at 443 (emphasis in original). But the inevitable discovery rule is not an exception designed to swallow the exclusionary rule and *Williams II* did

not so hold. Rather, the Court's reasoning is consistent with a more limited proposition: that the inevitable discovery exception is subject to the same limitation that restricts application of the independent source exception. That is, it applies when the lawful means that would have led to the challenged evidence are wholly independent of any constitutional violation. *Id.* at 448 ("when, as here, the evidence in question would inevitably have been discovered *without reference to the police error or misconduct*, there is no nexus sufficient to provide a taint") (emphasis added).

Based on its analysis, *Williams II* held that the prosecution bears a burden to prove—not merely assert—that a lawful means would inevitably have led to the evidence. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means then the deterrence rationale has so little basis that the evidence should be received." *Id.* at 444. The *Williams II* Court concluded that the evidence pertaining to the discovery and condition of the victim's body was admissible because the prosecution proved that the victim's body inevitably would have been found by an independent team of searchers that had been separately looking for the body. *See id.* at 448 (upholding admissibility because evidence in question showed the body "would inevitably have been discovered" by the searchers "without reference to the police error or misconduct").

Finally, *Murray v. United States* addressed whether the independent source exception applies to evidence initially discovered during an illegal entry and search, but later obtained independently from activities untainted by the initial constitutional misconduct. After lawfully discovering narcotics in two vehicles, federal officers illegally entered the warehouse from which the vehicles had come. Inside the warehouse, officers observed burlap-wrapped bales. The officers left the warehouse, obtained a warrant to search the

warehouse, and executed the warrant and seized the bales that contained marijuana. *Murray* ruled that the bales of marijuana might be admissible under the independent source exception. But, again, the Court did so with the proviso that the means used to discover the evidence must be both lawful and wholly independent of any unconstitutional conduct—just as *Silverthorne* had envisioned, and *Segura* and *Williams II* had held. As Justice Scalia stated, "[t]he ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Murray*, 487 U.S. at 542. Under the facts in *Murray*, Justice Scalia explained that would be the case if the government could prove that the officers' decision to obtain a warrant was not prompted by what they had seen during the initial, illegal entry into the warehouse, and the information obtained during that illegal entry was not presented to the magistrate and did not affect his decision to issue the warrant. *Id.*

Silverthorne, *Segura*, *Williams II*, and *Murray* plainly establish that the independent source and inevitable discovery exceptions permit the admission of evidence previously illegally obtained only when lawful means, wholly independent of any unconstitutional conduct, would have revealed the challenged evidence. Obviously, when evidence is "derived from or related in any way to" an illegal entry and search (*Segura*, 468 U.S. at 814), it cannot be admitted under either of these exceptions.

2. The Court Below Has Improperly Applied The Inevitable Discovery Exception

Despite the straightforward rule established in these cases, the Michigan Supreme Court concluded that evidence discovered after an illegal entry and search of a defendant's home is always admissible when the police fail to comply with the announcement requirement, provided they act pursuant to a valid warrant. *Stevens* justified this conclusion

by explaining that "the evidence would have been discovered despite any police misconduct." 597 N.W.2d at 62. *Stevens* also reasoned that admitting the evidence found after an announcement violation "does not put the prosecution in any better position than it would be in had the police adhered to the knock-and-announce requirement." *Id.* Excluding the evidence, however, "puts the prosecution in a worse position than it would have been in had there been no police misconduct." *Id.* This reasoning incorrectly applies the independent source and inevitable discovery exceptions established by this Court.

a. At the outset, the Michigan courts erred when they ruled that the evidence obtained from Petitioner was admissible because "the evidence would have been discovered despite any police misconduct." *Id.* at 62. The inevitable discovery exception cannot be used to justify the admission of evidence seized after the illegal entry and search of Petitioner's person and home. As discussed above, *Segura*, *Williams II*, and *Murray* establish that for the evidence to be admitted under this exception, the prosecution must meet its burden to show that a lawful and independent intrusion would have uncovered the evidence: which, on the facts of those cases, involved showing a lawful intrusion was either (1) underway or (2) would soon be executed and (3) that the lawful intrusion would have disclosed evidence that had originally been secured by unconstitutional conduct. *See, e.g.*, *Williams II*, 467 U.S. at 488 (admitting evidence based on proof that a search team independently searching for body would "inevitably" have discovered it).

Here, Respondent cannot show that lawful means either were used or imminently would have been used to discover the evidence found in Petitioner's pants. To the contrary, and in contrast to *Segura*, *Williams II*, and *Murray*, there was only one search and one intrusion in this case—and it was unreasonable under the Fourth Amendment. Thus, Respondent cannot show

that the evidence seized from Petitioner "ultimately or inevitably would have been discovered by lawful means," and "without reference to the police error or misconduct." *Id.* at 444, 448. Nor can Respondent prove the evidence found in Petitioner's pants was the result of "a later, lawful seizure [that] is genuinely independent of an earlier, tainted one." *Murray*, 487 U.S. at 542.

For similar reasons, Respondent cannot establish what the government proved in *Segura*. That is, the prosecution cannot prove that none of the evidence seized from Petitioner "was derived from or related in any way to the initial [illegal] entry into petitioner['s] [home]." *Segura*, 468 U.S. at 814. Respondent cannot demonstrate that the evidence seized from Petitioner "came from sources wholly unconnected with the entry and was known to the [Detroit police] well before the initial [illegal] entry." *Id.* Furthermore, Respondent cannot prove that the evidence taken from Petitioner "was the product of [a] search, wholly unrelated to the prior [illegal] entry." *Id.* In sum, Respondent cannot establish, as this Court's rulings require it to do to invoke the independent source or inevitable discovery exceptions, that "[t]he illegal entry into petitioner['s] [home] did not contribute in any way to discovery of the [challenged] evidence." *Id.* at 815.

b. The Michigan courts also erroneously relied on the fact that the police acted pursuant to a valid search warrant, opining that the warrant causally disconnected the search from the illegal entry. But this analysis is flawed because possession of a valid warrant, standing alone, is not a sufficient basis for invoking the inevitable discovery exception. Rather, in *Wilson v. Layne*, the Court squarely held that the existence of a valid warrant cannot, *post hoc*, make an otherwise unreasonable intrusion reasonable. 526 U.S. 603, 611 (1999) (possession of a valid arrest warrant did not entitle police to bring members of the press with them to execute warrant).

As one commentator has noted, invocation of the inevitable discovery rule cannot turn simply on

> whether the evidence would have been discovered had the officers acted differently; it must be whether the evidence would have been discovered had the illegal search never occurred. If the officers in possession of the issued warrant enter illegally, there can be no ultimate or inevitable discovery by lawful means. The only possible lawful search, pursuant to the warrant, was tainted by the illegal entry.[6]

Consequently, the evidence found inside Petitioner's pants is inadmissible, notwithstanding the existence of a valid search warrant. A contrary result would allow the police "to do what [they] cannot do otherwise"—ignore *Wilson*. *Cf. Stevens*, 597 N.W.2d at 70 (Cavanagh, J., dissenting).

c. The reasoning of *Stevens* was also flawed because it relied upon hypothesized facts that officers might or could have obtained illegally seized evidence properly. A similar problem arises in Petitioner's case: There is no evidence in this record to support the assertion that "the discovery of the evidence in [Petitioner's] case was inevitable, regardless of the illegalities on the police officers' entry into [Petitioner's] home." *Id.* at 64. In effect, the prosecution, like *Stevens*, rests on the absurd and flimsy theory "that police would have done it right had they not done it wrong." 6 Wayne R. LaFave, *Search and Seizure* § 11.4(a), at 270 n.77 (4th ed. 2004), *quoting State v. Davolt*, 84 P.3d 456, 469 (Ariz. 2004). Professor LaFave properly describes this as an "Alice-in-Wonderland version of inevitable discovery." *Id.* at 273.

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[6] Mattias Luukkonen, *Knock, Knock. What's Inevitably There? An Analysis of the Applicability of the Doctrine of Inevitable Discovery to Knock and Announce Violations*, 35 McGeorge L. Rev. 153, 177 (2004).

Even if one is willing to assume facts not supported by the record, such an assumption would not matter under the inevitable discovery rule. Rather than depend upon "metaphysical analysis," *Murray*, 487 U.S. at 542, or rank conjecture, the inevitable discovery exception was designed to apply to the real world of police investigations and after-the-fact judicial review. The exception "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification." *Williams II*, 467 U.S. at 431 n.5. Yet, the record in this case, unlike that in *Segura* and *Williams II*, lacks *any* "demonstrated historical facts" (*id.*) that prove lawful means, genuinely independent of any unconstitutional conduct, would have revealed the evidence found on Petitioner. When this element is missing, the inevitable discovery or independent source exceptions are simply unavailable, and it is beside the fact that judges are able to imagine that police officers *could* have done things differently.[7] In effect, Petitioner would permit the admission of unlawfully obtained evidence anytime the police say, "'Yes, what [we] did was illegal, but [we] could have done the same thing and obtained the same evidence through legal means if [we] had chosen to follow [constitutional] procedure. Hence, [we] would have discovered the evidence anyway.'"[8] *Williams II* does not condone such a perverse result.

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[7] As Professor Yale Kamisar puts it, the inevitable discovery exception allows the admission of illegally obtained evidence if the prosecution can prove that the evidence "'ultimately or inevitably *would* have been discovered by lawful means.' It does not apply simply because the police *could* have or *might* have obtained the evidence lawfully—simply because 'the police had *the capacity* (which they did not exercise)' to proceed lawfully." *See* Yale Kamisar et al., *Modern Criminal Procedure: Cases–Comments–Questions* 919-20 (11th ed. 2005) (emphasis in original) (citations omitted).

[8] Loly Garcia Tor, *Mandating Exclusion for Violations of the Knock and Announce Rule*, 83 B.U. L. Rev. 853, 868 (2003).

d. Finally, the Michigan Supreme Court also improperly reasoned that exclusion is never an appropriate remedy for evidence unlawfully obtained after a violation of the announcement rule because exclusion would put the prosecution in a "worse position" because of police misconduct. Neither the holding nor logic of *Williams II* supports this conclusion.

To be sure, *Williams II* explained that the independent source and inevitable discovery exceptions "ensure[] that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." 467 U.S. at 443 (emphasis in original); *see also id.* at 443-44, 445, 447 (explaining that "suppression of evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct") (emphasis in original). None of these statements, however, support the *per se* rule of non-exclusion adopted by the Michigan Supreme Court. Exclusion was inappropriate in *Williams II* not simply because omitting the evidence put the prosecution in a worse position. After all, exclusion of evidence *always* puts the prosecution in a worse position than it would be if there had been no exclusion. Taken seriously, the Michigan Supreme Court's flawed interpretation of *Williams II* would overrule the exclusionary rule—which, of course, *Williams II* did not do.

Exclusion was inappropriate in *Williams II* for a more limited reason: because the challenged evidence would have had an independent source free from the taint of the unconstitutional conduct that initially secured the evidence. As Chief Justice Burger noted for the majority: "*When* the challenged evidence has an *independent source*, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Id.* at 443 (emphasis added); *see also id.* at 448 (evidence may be admitted where the prosecution proves by a preponderance of evidence that it "would inevitably have been discovered

without reference to the police error or misconduct") (emphasis added). But when the prosecution cannot show that illegally seized evidence would have been inevitably uncovered by lawful means, the inevitable discovery and independent source exceptions are inapplicable, and exclusion is required notwithstanding the obvious fact that exclusion puts the prosecution in a worse position than it would have been in absent police misconduct. Because Respondent did not prove that the cocaine illegally seized from Petitioner would have been disclosed by lawful means, this evidence should have been suppressed, and it is immaterial that exclusion would have put the prosecution in a worse position.

The *per se* rule of non-exclusion adopted by the Michigan Supreme Court also conflicts with another aspect of *Williams II*. Chief Justice Burger noted that "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." *Id.* at 445. Under the *per se* rule adopted below, however, Michigan law enforcement officers can be certain that failure to follow the announcement requirement will cause no adverse consequences at a criminal trial because exclusion will always be unavailable. This result contradicts the *Williams II* Court's understanding of how the inevitable discovery exception would be applied because it encourages officers to take unconstitutional "'shortcuts' to obtain [incriminating] evidence." *Id.* at 446. As Justice Stevens' concurrence noted in *Williams II*, the majority was careful "to insist that any rule of exclusion not provide the authorities with an incentive to commit violations of the Constitution." *Id.* at 456 (Stevens, J., concurring in judgment). Contrary to that goal, the *per se* exception to the exclusionary rule imposed by the Michigan courts gives police officers a substantial incentive "to avoid the uncertainties inherent in [their] search for evidence, [which in turn] undermines the constitutional guarantee itself, and therefore [is] inconsistent with the deterrent purposes of

the exclusionary rule." *Id.* (footnote omitted). Ultimately, "[i]t seems inappropriate, to say the least, to develop a bright-line rule that informs police how to 'properly' violate someone's Fourth Amendment rights."[9]

Yet, this is the very effect of the *per se* rule adopted by the Michigan Supreme Court: Michigan police officers have little incentive to follow the instructions of this Court (or any court) regarding their method of entry into a private home, because any incriminating evidence discovered by the police will be admissible regardless of whether officers obey the law.

CONCLUSION

For the reasons stated above, the judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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[9] Stephen E. Hessler, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 Mich. L. Rev. 238, 260 (2000).

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IN THE

Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

On Writ of Certiorari to the Court of Appeals of Michigan

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the exclusionary rule apply to violations of the knock and announce rule?

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IN THE

Supreme Court of the United States

BOOKER T. HUDSON, JR.,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The considerable cost of the Fourth Amendment exclusionary rule is well known. Reliable evidence of guilt is suppressed without regard to the severity of the invasion of privacy. The public is forced to bear the costs of the officer's blunder, while

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

the criminal reaps the immediate reward. At the same time, the reason for the exclusionary rule, deterring police from violating the Fourth Amendment, is unproven. This costly rule should not be extended any further. Applying the exclusionary rule to knock and announce violations will allow guilty criminals to escape punishment without adding any meaningful deterrent. This is contrary to the interests of justice and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 27, 1998, Detroit police officers executed a search warrant at the home of the defendant, Booker T. Hudson. Joint Appendix ("J. A.") 4-5. The search took place at 3:35 p.m. J. A. 5. Police found Hudson sitting in a chair in the living room as they entered. *Ibid.* An officer announced their presence and purpose before entering, but did not knock. J. A. 8. The officers waited three or four seconds after the announcement, but did not wait for an answer before entering. See *ibid.* Several officers entered, and one patted down Hudson, finding five rocks of cocaine in his left front pants pocket. J. A. 6-7.

The trial court suppressed the cocaine as the product of a knock and announce violation, but the Michigan Court of Appeals reversed, relying on Michigan Supreme Court precedent holding that the exclusionary rule did not apply to knock and announce violations. See *People* v. *Hudson*, No. 246403 (Mich. App. June 17, 2004), p. 1; see also *People* v. *Stevens*, 460 Mich. 626, 647, 597 N. W. 2d 53, 64 (1999). On remand, the defendant was convicted at a bench trial of possession of less than 25 grams of cocaine with the intent to deliver. See *Hudson*, *supra*, at 1. Hudson was sentenced to 18 months probation. See *ibid.* His conviction was affirmed by the intermediate appellate court. See *ibid.* The Michigan Supreme Court denied Hudson's application for leave to appeal. See *People* v. *Hudson*, 472 Mich. 862, 692 N. W. 2d 385 (2005).

This Court granted certiorari on January 27, 2005.

SUMMARY OF ARGUMENT

The exclusionary rule is a very costly remedy that should not be extended "by even a fraction of an inch." The rule's costs are substantial. By depriving the courts of relevant, reliable evidence of guilt, the exclusionary rule allows criminals to go free because of police error. The remedy is also unfair, as it is applied without regard to the degree of harm done to the victim's Fourth Amendment rights. This mismatch between punishment and harm causes the exclusionary rule to overdeter, which induces police to refrain from engaging in useful, lawful activity.

Arrayed against these substantial costs is a deterrent that is unproven and unprovable. Tort law would seem to provide a more efficient remedy, since it is the traditional means for remedying invasions of privacy, and monetary damages are rewarded in proportion to the harm suffered. A tort law substitute for the exclusionary rule is not possible right now because immunity doctrines shield police and governments from civil liability for Fourth Amendment violations, and because *Mapp* v. *Ohio*, 367 U. S. 643 (1961) discourages the states from developing alternative remedies. The exclusionary rule is the remedy for Fourth Amendment violations not because it is efficient or just, but by default. A rule such as this should only be applied when absolutely necessary.

Whether the exclusionary rule applies to knock and announce violations remains an open question even after *Miller* v. *United States*, 357 U. S. 301 (1958) and *Sabbath* v. *United States*, 391 U. S. 585 (1968). There was no real debate over the relationship between the knock and announce rule and the exclusionary rule in *Miller*. That decision simply reflects this Court's willingness to impose the exclusionary rule on the federal government for lesser wrongs than a violation of the Constitution. Also, *Miller* did not apply its rule to the states,

and the law of the exclusionary rule has developed considerably since that decision. Since *Sabbath* is simply an application of *Miller*, these decisions do not govern the present case. Instead, it is necessary to weigh the costs and benefits of exclusion before deciding whether to apply the exclusionary rule in knock and announce violations.

The balance of interests does not justify extending the exclusionary rule to knock and announce violations. Since there is no legitimate causal connection between a knock and announce violation and the discovery of evidence, the exclusionary rule's deterrent is compromised. Applying the exclusionary rule to knock and announce violations would place the police in a worse position than if the violation had never occurred, which is contrary to the rationale of the inevitable discovery exception to the exclusionary rule.

The only possible causal connection between a knock and announce violation and discovering evidence is if the violation prevents the destruction of the evidence, which is not a legitimate reason for distinguishing the inevitable discovery exception. The exclusionary rule is also unnecessary to induce officers into complying with the Fourth Amendment, since officer safety is a powerful incentive for police to follow the knock and announce rule. Therefore, there is no reason to invoke the compromised deterrent of the exclusionary rule.

ARGUMENT

I. The exclusionary rule should not be extended "by even a fraction of an inch."

This case centers on the eternally controversial Fourth Amendment exclusionary rule. In spite of over a half century of debate, see 1 W. LaFave, Search and Seizure § 1.2(a), p. 27, and n. 1 (4th ed. 2004), fundamental questions about the rule remain unanswered. While the primary rationale for the exclusionary rule is deterring Fourth Amendment violations,

see *Stone* v. *Powell*, 428 U. S. 465, 486 (1976), its value as a deterrent is at best unproven. Empirical studies on the exclusionary rule's deterrence are typically flawed. See *United States* v. *Janis*, 428 U. S. 433, 449-450, and n. 22 (1976). Given the numerous practical difficulties with making a good empirical assessment of the rule's deterrence, see *id.*, at 450-453, proving that the exclusionary rule actually does deter police misconduct may be impossible. See Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 Ill. L. Rev. 363, 368-371; Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention, 23 So. Tex. L. J. 559, 560 (1982); Morris, The Exclusionary Rule, Deterrence and Posner's Economic Analysis of the Law, 57 Wash. L. Rev. 647, 653 (1982).

Although unproven and probably unprovable, the exclusionary rule still looms over the criminal justice system. While "significantly limited" by this Court's decisions, see *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364, n. 4 (1998), the main thrust of the exclusionary rule still operates in countless cases to suppress the fruits of illegal searches or seizures from being used as evidence of guilt. This gives *Mapp* v. *Ohio*, 367 U. S. 643 (1961) and its progeny an extraordinary influence over the criminal justice system, being a potential issue in almost every criminal case.

While the rule remains pervasive but unproven, its costs are not ephemeral. The heavy cost and potential unfairness of the exclusionary rule was well known even before *Mapp* extended that rule to the states. As Justice Cardozo famously put it, "The criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926). Dean Wigmore had similar sentiments:

> " 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so

> by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.'
>
> "Some day, no doubt, we shall emerge from this quaint method of enforcing the law. At present, we see it in many quarters. It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice." 8 J. Wigmore, Evidence § 2184a, p. 31, n. 1 (McNaughton rev. 1961) (quoting 8 J. Wigmore, Evidence § 2184 (3d ed. 1940) (emphasis in original)).

Searches and seizures produce physical evidence, which is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone*, 428 U. S., at 490. Since there is little, if any, connection between the legality of the search and the reliability of the seized evidence, see *ibid.*, the exclusionary rule deprives the criminal justice system of reliable evidence, requiring the prosecution to use less reliable evidence or to forgo prosecution entirely. Cf. *United States* v. *Patane*, 542 U. S. 630, 124 S. Ct. 2620, 2631,159 L. Ed. 2d 667, 680 (2005) (Kennedy, J., concurring) (noting "important probative value of reliable physical evidence"). This makes the exclusionary rule a very costly remedy to society.

"There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *United States* v. *Havens*, 446 U. S. 620, 626 (1980). By depriving the criminal justice system of one of the most effective means of achieving this fundamental interest, the exclusionary rule places a substantial cost on society. See *Janis*, 428 U. S., at 448-449; see also *Stone*, 428 U. S., at 489-490. "Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the

truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Scott*, 524 U. S. at 364. It is no surprise that some recent research shows that the rule played a role in the increase in crime following *Mapp*. See Atkins & Rubin, Effects of Criminal Procedure on Crime Rates: Mapping Out Effects of the Exclusionary Rule, 46 J. Law & Econ. 157, 173-174 (2003). One "conservative estimate" places the cost at about "10,000 felons and 55,000 misdemeanants who evade punishment each year because of successful Fourth Amendment suppression motions." Slobogan, *supra*, at 443, and n. 359; see also *United States v. Leon*, 468 U. S. 897, 998, n. 6 (1984).

Another dimension to the exclusionary rule's cost is that the rule does not take into account the actual damage to the privacy of the victim of the illegal search or seizure. As this Court has made clear, the exclusionary rule is not justified by any sense of redress to the victim of the police illegality. See *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). A remedy that is not matched to the actual cost of the harm is an invitation to unfairness and skews the incentives that are supposed to be the justification for the rule.

The exclusionary rule is often a gift to the criminal defendant fortunate enough to win the Fourth Amendment lottery. A major shortcoming of the rule is that its exercise does not depend upon the degree of intrusion upon constitutionally protected privacy interests. A minor violation of *Terry* v. *Ohio*, 392 U. S. 1 (1968) creates as strong of a case for suppression as a suspicionless, warrantless, night-time invasion of a house. Nor does the rule's use turn on the importance of what is being suppressed. A shoplifted bottle of water and a murder victim's body are equally suppressible. At the same time, some of the worst violations of privacy, like intentional police harassment, are beyond the rule's deterrent. See Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 795-798 (1994); Posner, Rethinking the Fourth Amendment, 1981 S. Ct. Rev. 49, 54 (1982). "Freeing either a tiger or a mouse in a school-

room is an illegal act, but no rational person would suggest that these two acts be punished in the same way." *Bivens* v. *Six Unknown Narcotics Agents*, 403 U. S. 388, 419 (1971) (Burger, C.J., dissenting). Yet the exclusionary rule treats all violations equally without regard to the actual harm inflicted by the search, or what was gained by the search. "The disparity in some cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." *Stone*, 428 U. S., at 490.

While the exclusionary rule is justified as a necessary defense of the Fourth Amendment, it is not a part of the Fourth Amendment's guarantee. Unlike the Fifth Amendment self-incrimination privilege, there is no textual authorization for a Fourth Amendment exclusionary rule. See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 496 (1971) (Black, J., concurring and dissenting); cf. *Patane*, 124 S. Ct., at 2628, 159 L. Ed. 2d, at 677 (plurality opn.). Nor can support for the Fourth Amendment exclusionary rule be found in constitutional history. The exclusionary rule cannot be justified by an appeal to the intent of the framers of the Fourth Amendment or common law remedies for illegal government searches. See Amar, 107 Harv. L. Rev. 757, 785-787; Posner, 1981 S. Ct. Rev., at 51-52. It is not a part of the Fourth Amendment. See *Scott*, 524 U. S., at 362; *Leon*, 468 U. S., at 906. It is a judicially created constitutional policy that lives or dies on the grounds for its justification. See *Arizona* v. *Evans*, 514 U. S. 1, 10-11 (1995).

Disproportionality is not just a minor flaw. Rather, it is a feature of the exclusionary rule. One contention on behalf of the rule is that the victims of illegal searches will often lack the incentives and resources to bring an action for damages. Amsterdam, Perspective on the Fourth Amendment, 58 Minn. L. Rev. 349, 430 (1974). While a comparatively small invasion of privacy will not support a sufficient level of damages to justify civil litigation, the exclusionary rule

provides both the incentive and the forum to vindicate these rights.

This highlights another problem with the exclusionary rule. Even if the exclusionary rule does deter, it does so in a socially inefficient manner. Since the exclusionary rule is simply a constitutional policy, it must deter efficiently if it is to be allowed to deter at all.

Ideally, the Fourth Amendment should be enforced through an optimum deterrent, one where the penalty for the offense is equal to the cost to society of the improper conduct. See Posner, 1981 S. Ct. Rev., at 54-55. The legitimate costs to be protected by the exclusionary rule are the privacy and property interests protected by the Fourth Amendment. See *id.*, at 50-51. The criminal's interest in avoiding punishment, while the motivation for the suppression motions that give the exclusionary rule its force, is not a legitimate interest for the rule to vindicate. See *id.*, at 51-52. The exclusionary rule's lack of proportionality means that there will be many situations in which a minimal privacy value will be enforced through the socially costly suppression of evidence.

Too much deterrence is no better for society than too little. Since people cannot predict the legal outcome of their actions with absolute precision, excessive deterrence "will lead people to forgo socially valuable activities near the uncertain boundary." *Id.*, at 55. By overpunishing relatively trivial infringements upon privacy, the Fourth Amendment exclusionary rule overdeters. The rule "is not merely crude; to the extent obeyed, it systematically overdeters, because it imposes social costs that are greatly disproportionate to the actual harm to lawful interests from unreasonable searches and seizures." *Id.*, at 56.

Tort law would seem to be a more appropriate remedy for Fourth Amendment violations. It is a natural avenue for redressing wrongs, and readily accommodates the invasions of privacy that would make up a standard Fourth Amendment civil action. See *id.*, at 53-54. It is also the method of enforce-

ment intended by the framers of the Fourth Amendment. See Amar, 107 Harv. L. Rev., at 786. Unlike the exclusionary rule, the tort remedy can be adjusted to fit the level of intrusion on Fourth Amendment interests, yielding a more optimum deterrent. See Posner, 1981 S. Ct. Rev., at 54. Unfortunately, two factors prevent substituting tort law for the exclusionary rule at this time. The first is the substantial web of civil immunities surrounding government action that have developed over the years. See *id.*, at 64-68. While it could be possible for a state to deal with this problem and design an effective tort alternative to the exclusionary rule, a second problem prevents this.

Since *Mapp* was in part based upon the inadequacy of other remedies, it is understandable that the states and the federal government do not want to risk an alternative remedy. While this Court invited alternative approaches in *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966), a majority of this Court has not yet encouraged alternatives to the exclusionary rule. The fact that the most prominent opinion advocating alternative remedies is a dissent, see *Bivens*, 403 U. S., at 411-426 (Burger, C.J., dissenting), is telling. A state that went to the expense of establishing an alternative civil remedy has no reason to believe that it could then dispense with the exclusionary rule. *Mapp*'s uneasy compromise deters the innovation that could enforce the Fourth Amendment at much less cost to society than the exclusionary rule, effectively preempting the field of any alternatives.

The exclusionary rule is little more than a "lesser evil" approach to the Fourth Amendment. The defenses of the rule resonate with the claim that some method for enforcing the Fourth Amendment must be found or the right will be a dead letter. See *Mapp*, 367 U. S., at 660 ("we can no longer permit that [Fourth Amendment] right to remain an empty promise"); see also *Terry*, 392 U. S., at 12. The exclusionary rule has won the contest to defend the Fourth Amendment more by default than on its merits as a fair and efficient remedy.

The notion that we need the exclusionary rule because nothing else works is a poor justification for such an important constitutional policy. See Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1032 (1974). It may also be the best available argument for the rule. The deterrent rationale is unproven and unprovable, the costs of exclusion are substantial, and the rule will work genuine unfairness in many cases. Inertia and a lack of available alternatives may be the best explanations for the exclusionary rule's continued survival.

Even this weak rationale for the rule may diminish. It is now easier for victims of illegal searches and seizures to seek damages in the courts than it was when *Mapp* was decided. Federal law now allows for the recovery of attorneys fees for a successful plaintiff in a civil rights action. See 42 U. S. C. § 1988. The tort and civil rights bars have developed considerably since *Mapp*. There are now more alternatives to curb abusive police conduct than existed when *Mapp* was decided. See *Dickerson* v. *United States*, 530 U. S. 428, 442 (2000) (more remedies than when *Miranda* was decided, three years later). If this Court were to encourage alternatives, the states might feel more free to use these new tools to fashion a superior alternative.

A further problem with the exclusionary rule is that it disproportionately grants more benefits to criminals than to the innocent. See Posner, 1981 S. Ct. Rev., at 54; Amar, 107 Harv. L. Rev., at 795-796. By relying on suppression motion to enforce the Fourth Amendment, the exclusionary rule elevates the accused criminal into "a kind of private attorney general." Amar, *supra*, 796.

> "But the worst kind. He is self-selected and self-serving. He is often unrepresentative of the larger class of law-abiding citizens, and his interests regularly conflict with theirs. Indeed, he is often despised by the public, the class he implicitly is supposed to represent. He will litigate on the worst set of facts, heedless that the result will be a bad precedent for the Fourth Amendment generally. He

> cares only about the case at hand — his case — and has no long view. He is not a sophisticated repeat player. He rarely hires the best lawyer. He cares only about exclusion — and can get only exclusion — even if other remedies (damages or injunctions) would better prevent future violations. He is, in many ways, the exact opposite of the litigants the NAACP sought out in its carefully orchestrated campaign to revive the Equal Protection Clause in the 1930s through the 1960s. He is, in short, an awkward champion of the Fourth Amendment." *Ibid.*

While the innocent may receive some secondary benefit if the exclusionary rule actually deters illegal searches of innocent civilians, the fact remains that criminals are the primary beneficiaries of the rule. The proponents of the rule cannot ignore the fact that under the exclusionary rule "the more guilty you are the more you benefit." *Id.*, at 797. The rule creates a Fourth Amendment enforced by an "overcompensated" private attorney general, see *id.*, at 796, which can only lead to the distortion of search and seizure law.

This Court recognizes that the exclusionary rule is a costly sanction that should be employed only in "certain circumstances." *Scott*, 524 U. S., at 364. It is an "extreme sanction," *Leon*, 468 U. S., at 916, that should only be used when truly necessary. "We have previously cautioned against expanding 'currently applicable exclusionary rules by erecting additional barriers to placing truthful evidence before state juries . . . .' " *Colorado* v. *Connelly*, 479 U. S. 157, 166 (1986) (quoting *Lego* v. *Twomey*, 404 U. S. 477, 488-489 (1972)). "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986). The exclusionary rule is a direct assault on this vital societal interest. It may be the only alternative for now, but the exclusionary rule should only be employed when absolutely necessary to protect the Fourth Amendment through its unproven deterrent.

It has been over 40 years since *Mapp*. It is highly unlikely that there is any remaining aspect of search and seizure law so fundamental that it will require an expansion of the exclusionary rule. The exclusionary rule should not be extended to cover the knock and announce rule, even if that required only a fractional extension of *Mapp*. Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961) ("but we decline to go beyond it, by even a fraction of an inch").

II. Whether the exclusionary rule applies to knock and announce violations remains an open question.

The decision incorporating the knock and announce rule into the Fourth Amendment explicitly declined to address whether the independent source doctrine and the inevitable discovery rule precluded the use of the exclusionary rule in knock and announce cases. See *Wilson* v. *Arkansas*, 514 U. S. 927, 937, n. 4 (1995). Petitioner attempts to preempt this issue by invoking a pair of cases decided long before *Wilson*. See Petitioner's Brief 9-12. While this Court did suppress evidence because of violations of the federal statutory knock and announce rule in *Miller* v. *United States*, 357 U. S. 301 (1958), and *Sabbath* v. *United States*, 391 U. S. 585 (1968), these cases do not govern the exclusionary rule's application to the Fourth Amendment knock and announce rule. Those cases come from an era when the knock and announce rule had a much smaller impact on the criminal justice system than it has now, and when the understanding of the exclusionary rule was far from fully developed. While *Miller* and *Sabbath* could be relevant to a knock and announce rule that only applied to the federal government, they are irrelevant to the Fourth Amendment regime at issue in the present case.

In *Miller*, federal agents arrested Miller at his apartment. See 357 U. S., at 302. One of the agents knocked on Miller's door and was met with a " 'Who's there,' " to which the agent responded, " 'Police.' " *Id.*, at 303. Miller then went to the

door, with the chain attached, and asked the officers what they were doing there. Before the agents could reply, Miller closed the door. The agents " put our hands inside the door and pulled and ripped the chain off, and entered.' " *Id.*, at 303-304. Miller and his codefendant were then arrested, and marked money used in an earlier drug transaction was found in the apartment. *Id.*, at 304. "The officers had no arrest or search warrant." *Ibid.*

Although the federal statutory knock and announce rule only regulated the execution of search warrants, the government conceded that the rule also applied to warrantless arrests under rules developed judicially by the D.C. Circuit. See *id.*, at 306. After examining the common law history of the knock and announce rule, see *id.*, at 306-309, the *Miller* Court concluded that the federal officers did not comply with the rule because they did not state their purpose before entering. See *id.*, at 313-314. This made the resulting arrest unlawful, and without further discussion the Court held, "the evidence seized should have been suppressed." *Id.*, at 314.

In *Miller*, the application of the exclusionary rule to knock and announce violations was not central to the decision. In the opinion, it was merely presented as a given and was not contested by the dissent. The petitioner argued that his arrest was illegal. See Brief for Petitioner in *Miller* v. *United States* (October Term 1957, No. 126), pp. 14-15. The knock and announce violation was given as one reason for the arrest's illegality. See *id.*, at 15-16. The argument that illegality of the arrest requires exclusion is cursory, see *id.*, at 28-29, and it contains no discussion of a causal connection between the illegality and obtaining the evidence. The United States did not even address the exclusionary rule, as it simply argued that the arrest and resulting search was legal. See Brief for United States in *Miller* v. *United States* (October Term 1957, No. 126), pp. ii, 8-13, 27-29.

The lack of discussion on the role of the exclusionary rule highlights a key difference between *Miller* and the present case.

This Court has been more willing to impose the exclusionary rule on the federal government than on the states. For example, this Court waited 47 years between the decision to impose the Fourth Amendment exclusionary rule on the federal government, see *Weeks* v. *United States*, 232 U. S. 383 (1914) and deciding to do the same to the states. See *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Another example is this Court's willingness to apply the exclusionary rule for violations of the Federal Rules of Criminal Procedure. In *Mallory* v. *United States*, 354 U. S. 449, 453, 455-456 (1957), this Court suppressed a confession because of the failure to comply with Rule 5(a)'s requirement for prompt arraignment after arrest. *Mallory*, along with *McNabb* v. *United States*, 318 U. S. 332 (1943), was an exercise of this Court's supervisory power. See *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 354 (1994). This Court has also invoked its supervisory power to enjoin federal agents from turning evidence seized in violation of Rule 41(c) over to state officials. See *Rea* v. *United States*, 350 U. S. 214, 216-217 (1956).

While the use of supervisory power to exclude evidence must be used with restraint, see *United States* v. *Payner*, 447 U. S. 727, 734-735 (1980); *Lopez* v. *United States*, 373 U. S. 427, 440 (1963), this Court will apply the exclusionary rule to the federal government for lesser wrongs than a violation of the Constitution. Since *Miller* only applied to the federal government, it had far less effect on the criminal justice system than would a decision applying the exclusionary rule to knock and announce today. The enforcement of the criminal law is primarily a function of the states. See *Payne* v. *Tennessee*, 501 U. S. 808, 824 (1991). Applying a federal criminal rule to the states through the Constitution vastly expands that rule's influence and importance. The *Miller* Court's automatic application of the exclusionary rule does not decide the much more important question before the Court today.

Miller was decided before many significant developments in the law of the exclusionary rule. It was part of a bygone era

of jurisprudence much more supportive of the exclusionary rule than modern case law. In addition to its deterrent effect, exclusion was also justified on the ground that the courts should not be accomplices to government illegality. See *Elkins* v. *United States*, 364 U. S. 206, 222-223 (1960); *McNabb*, 318 U. S. 345. This has been all but rejected, as deterrence is now the " 'prime purpose' of the rule, if not the sole one . . . ." *United States* v. *Janis*, 428 U. S. 433, 446 (1976) (quoting *United States* v. *Calandra*, 414 U. S. 338, 347 (1974)). The exclusionary rule was also once seen as an "essential part" of the Fourth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643, 657 (1961). Also, some supported the exclusionary rule through a combination of the Fourth and Fifth Amendments. See *id.*, at 661-663 (Black, J., concurring); *Agnello* v. *United States*, 269 U. S. 20, 33-34 (1925). These arguments are no longer valid. See *United States* v. *Leon*, 468 U. S. 897, 906 (1984).

Many exceptions to the rule were developed after *Miller*. While the independent source doctrine has a long pedigree, see *Segura* v. *United States*, 468 U. S. 796, 805 (1984), the other decisions limiting the exclusionary rule came after *Miller* and *Sabbath* were decided. See, *e.g.*, *Calandra*, *supra*; *Janis*, *supra*; *Rakas* v. *Illinois*, 439 U. S. 128 (1978) (standing); *Stone* v. *Powell*, 428 U. S. 465 (1976) (relitigation on habeas); *United States* v. *Leon*, 468 U. S. 897 (1984) (good-faith reliance on warrant).[2]

Sabbath adds nothing new to the exclusionary rule analysis. Like *Miller*, the case turned on whether the police violated knock and announce procedure under 18 U. S. C. § 3109. See *Sabbath*, 391 U. S., at 588. The *Sabbath* Court noted *Miller*'s "extensive analysis" of the common law knock and announce rule, see *id.*, at 589, and like *Miller*, summarily ordered the exclusion of evidence because of a knock and announce

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2. The inevitable discovery rule is "closely related" to the independent source doctrine, but it is still a separate rule, see *Nix* v. *Williams*, 467 U. S. 431, 443 (1984), that was formulated after *Miller* and *Sabbath*.

violation. See *id.*, at 586, 591. This simple application of *Miller*, decided before knock and announce was incorporated into the Fourth Amendment, and before this Court's further development of the exclusionary rule, has little bearing on the present case.

Hudson's reliance on *Miller* and *Sabbath* is part of a larger argument. He contends that since a knock and announce violation makes the search or arrest illegal, the exclusionary rule must apply. See Pet. Brief at 15. Besides the substantial conflict between this contention and the independent source and inevitable discovery doctrines, the argument also overstates the relationship between a Fourth Amendment violation and the exclusionary rule. The exclusionary rule is not a "necessary corollary" to the Fourth Amendment. See *Leon*, 468 U. S., at 905-906. The question of whether to impose the exclusionary sanction is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983). This issue is resolved weighing the costs and benefits of excluding the evidence in that case, see *Leon*, *supra*, at 906-907, which never occurred in *Miller* and *Sabbath*. A careful weighing of the costs and benefits of exclusion in this case shows that the exclusionary rule should not apply to knock and announce violations.

III. The exclusionary rule should not be extended to cover knock and announce violations.

The balancing of interests necessary to determine whether to apply the exclusionary rule, see *United States* v. *Leon*, 468 U. S. 897, 906-907 (1984), should be made in the context of the general balance of interests behind the rule. When applied to the standard situation like the use of the fruits of a warrantless search without probable cause, or a *Terry* v. *Ohio*, 392 U. S. 1 (1968) violation, as evidence of guilt, the exclusionary rule is just barely acceptable. Although it contains genuine

costs and uncertain benefits, the rule can still be justified, although just barely. See Part I, *supra*. The "drastic measure," *United States* v. *Janis*, 428 U. S. 433, 459 (1976), of excluding evidence because of a Fourth Amendment violation should not be employed if there is any genuine increase in costs or decrease in benefits relative to the balance struck in *Mapp* v. *Ohio*, 367 U. S. 643 (1961). For example, good faith reliance on a warrant, see *Leon*, *supra*, at 922, or use of the evidence at a deportation hearing, see *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1409 (1984), justify exceptions to the exclusionary rule. The "normal" application of the exclusionary rule is balanced on a knife's edge. Any substantial push means that the rule should not apply.

The exclusionary rule is not applied mechanically to every Fourth Amendment violation. Those asking to use this extraordinary sanction should bear a heavy burden of justification. "Although we have held that these costs [of excluding evidence] to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's 'costly toll,' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364-365 (1998) (footnote omitted) (quoting *United States* v. *Payner*, 447 U. S. 727, 734 (1980)).

A knock and announce violation lacks the characteristics that justify exclusion. The exclusionary rule's deterrent operates to remove "inducements to unreasonable invasions of privacy . . . ." *Leon*, 468 U. S., at 900. If there is no causal connection between the police illegality and the evidence, then the exclusionary rule should not apply. The knock and announce rule presents this lack of cause and effect, which is a sufficient reason to decline to impose the exclusionary sanction.

The inevitable discovery rule and the independent source doctrine demonstrate this limit to the exclusionary rule. Under the independent source doctrine, a prior illegal search does not

require suppressing evidence "if police had an 'independent source' for discovery of the evidence." *Segura* v. *United States*, 468 U. S. 796, 805 (1984). This rule starts with the decision in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920). See *Segura, supra*, at 799. *Silverthorne* held that the government could not use information from papers found through an illegal search as the basis for a subpoena of books and records held by the victim of that search. See 251 U. S., at 391-392. In dismissing the government's contention that it could use the information, Justice Holmes noted, "The government now, while in form repudiating and condemning the illegal seizure, seeks to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Id.*, at 391. This highlights the cause-effect relationship that is central to the exclusionary rule's deterrent.

The exclusionary rule is premised on the government getting the evidence through illegal means. The independent source doctrine addresses what happens when there is a break in the chain between the government's illegality and the evidence. "If knowledge of [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the government from its wrong cannot be used by it in the way proposed." *Id.*, at 392. If the causal relationship between the illegality and the relevant evidence is broken, the exclusionary rule's deterrence is compromised, and there is less reason for exclusion.

This principle was taken to its logical conclusion in the inevitable discovery case, *Nix* v. *Williams*, 467 U. S. 431 (1984). *Nix* held that the exclusionary rule did not apply to suppress the body of a murder victim that was found through illegal questioning, because the discovery of the body was inevitable even if the illegal questioning had never taken place. See *id.*, at 449-450. This was derived from the independent source rule of *Silverthorne* and *Wong Sun* v. *United States*, 371 U. S. 471 (1963). See 467 U. S., at 442. Although this was not a Fourth Amendment case, the same exclusionary rule princi-

ples applied. See *id.*, at 442, 446. "The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Id.*, at 442-443. *Nix* began by analyzing the "fruit of the poisonous tree" doctrine. The purpose behind this rule is to deter police misconduct by making sure that "the prosecution is not to be put in a better position than it would have been in if no illegality had transpired." *Id.*, at 443. The Court took this principle to the next logical step and developed the rationale for inevitable discovery doctrine. "By contrast, the derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." *Ibid.* (emphasis in original).

Two reasons support this corollary to the independent source doctrine. First, the extra harm caused by the loss of evidence that would have been found tips the balance of interests against exclusion. Second, applying the exclusionary rule in this situation would lead to overdeterrence. The law of search and seizure is complex, which creates problems for the exclusionary rule's deterrent. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 731 (1970); see also Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L. Rev. 736, 740-741 (1972). Police cannot be expected to know with certainty the Fourth Amendment consequences of every search and seizure. "We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson* v. *Creighton*, 483 U. S. 635, 644 (1987). The possible illegality of the search or seizure must be a part of every officer's calculations. If the exclusionary rule can put law enforcement in a worse position than if the activity never happened, then officers will be deterred from doing legal activities. The very costly exclusionary rule must deter accurately if it is to be imposed. See *supra*, at 9. It should not

not apply where it threatens to deter legal conduct in the pursuit of law enforcement.

These principles apply with equal force to the knock and announce rule. There is no legitimate connection between the knock and announce violation and the discovery of evidence. The knock and announce rule is only relevant when police are conducting an otherwise valid search or effecting a lawful arrest.[3] If the suspect would not have destroyed the evidence after a knock and announce, then the situation is the same as the inevitable discovery rule. Since the police would have found the evidence without the violation, applying the exclusionary rule would put the police in a worse position than if the violation had never occurred. As there is no practical difference between *Nix* and this situation, the exclusionary rule would not apply.

Although the same cannot be said if the suspect were to destroy the evidence after a knock and announce, the analysis does not change. While the exclusionary rule seeks to deter police illegality, it cannot be used to encourage or reward criminal behavior. One reason that the exclusionary rule does not apply to deportation proceedings is that applying the rule would force courts to shut their eyes to an ongoing crime. "The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime." See *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1047 (1984). Similarly, the exclusionary rule does not prevent the use of illegally obtained evidence to impeach the defendant, because the exclusionary rule cannot act as a shield that allows perjury to go unchallenged. See *United States* v. *Havens*, 446 U. S. 620, 626-627 (1980). Destroying property in anticipation of a lawful seizure is a crime. See 18 U. S. C. § 2232(a). The courts cannot shut their eyes to this criminal activity when deciding whether to

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3. If the search or seizure violates the Fourth Amendment for some other reason, then knock and announce is unnecessary for suppression.

apply the exclusionary rule. Also, averting the destruction of the evidence is grounds for dispensing with the knock and announce rule. See *Richards* v. *Wisconsin*, 520 U. S. 385, 394 (1997). The possibility that a knock and announce would lead to the destruction of evidence cannot be a legitimate ground to distinguish the inevitable discovery rule.

Applying the exclusionary rule to knock and announce cases will lead to the destruction of evidence. Since a violation will lead to the suppression of evidence from an otherwise legal search, officers will be more likely to knock and announce absent the most clearly compelling exigent circumstances. Officers will not be willing to take the risk of suppression in the many situations that they cannot predict the outcome with certainty, even though a failure to knock and announce may be upheld by the courts. This will lead to the destruction of evidence in situations where exigent circumstances would justify dispensing with knock and announce, a classic example of overdeterrence. See *supra*, at 9-10.

The *Nix* Court noted that where an officer knows that discovering the evidence is inevitable, "he will try to avoid engaging in any questionable practice" because "there will be little to gain from taking dubious 'shortcuts' to obtain the evidence." 467 U. S., at 445-446. In this situation, even without the threat of the exclusionary rule, "[s]ignificant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct." *Ibid.*

This consideration applies with even greater force to the knock and announce rule. In addition to the alternative incentives mentioned in *Williams*, police have a more substantial incentive to comply with the knock and announce—safety. Along with preserving privacy and property, the knock and announce rule also helps protect the safety of the officers and the occupants of the dwelling being entered. See, *e.g.*, *State* v. *Bamber*, 630 So. 2d 1048, 1052 (Fla. 1994); 2 W. LaFave,

Search and Seizure § 4.8(b), p. 665 (4th ed. 2004). "The unannounced breaking and entering into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measure which he otherwise would not have taken had he not known that a warrant had been issued to search his home." *State* v. *Carufel*, 112 R. I. 664, 668-669, 314 A. 2d 144, 147 (1974). This risk of an armed encounter with a frightened civilian is more incentive to comply with the knock and announce rule than the exclusionary rule could ever provide.

Applying the exclusionary rule to knock and announce violations has significantly higher costs than those normally associated with the rule. It will suppress evidence that would have been discovered absent the violation, and will lead to the destruction of evidence by suspects. The benefits of the rule are also much smaller than normal, as officers already have substantial incentives to knock and announce absent exigent circumstances. Since the balance of interests supporting the exclusionary rule are tenuous at best in normal circumstances, there is no justification for imposing this drastic remedy on the knock and announce rule.

CONCLUSION

The decision of the Michigan Court of Appeals should be affirmed.

October, 2005

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HUDSON *v.* MICHIGAN

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 04–1360. Argued January 9, 2006—Reargued May 18, 2006—Decided June 15, 2006

Detroit police executing a search warrant for narcotics and weapons entered petitioner Hudson's home in violation of the Fourth Amendment's "knock-and-announce" rule. The trial court granted Hudson's motion to suppress the evidence seized, but the Michigan Court of Appeals reversed on interlocutory appeal. Hudson was convicted of drug possession. Affirming, the State Court of Appeals rejected Hudson's renewed Fourth Amendment claim.

Held: The judgment is affirmed.

Affirmed.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II, and III, concluding that violation of the "knock-and-announce" rule does not require suppression of evidence found in a search. Pp. 2–13.

(a) Because Michigan has conceded that the entry here was a knock-and-announce violation, the only issue is whether the exclusionary rule is appropriate for such a violation. Pp. 2–3.

(b) This Court has rejected "[i]ndiscriminate application" of the exclusionary rule, *United States* v. *Leon*, 468 U. S. 897, 908, holding it applicable only "where its deterrence benefits outweigh its 'substantial social costs.'" *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 363. Exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining the evidence. The illegal entry here was not the but-for cause, but even if it were, but-for causation can be too attenuated to justify exclusion. Attenuation can occur not only when the causal connection is remote, but also when suppression would not serve the interest protected by the constitutional guarantee violated. The interests protected by the knock-and-announce rule include human life and limb (because an

unannounced entry may provoke violence from a surprised resident), property (because citizens presumably would open the door upon an announcement, whereas a forcible entry may destroy it), and privacy and dignity of the sort that can be offended by a sudden entrance. But the rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests violated here have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable. Pp. 3–7.

(c) The social costs to be weighed against deterrence are considerable here. In addition to the grave adverse consequence that excluding relevant incriminating evidence always entails—the risk of releasing dangerous criminals—imposing such a massive remedy would generate a constant flood of alleged failures to observe the rule, and claims that any asserted justification for a no-knock entry had inadequate support. Another consequence would be police officers' refraining from timely entry after knocking and announcing, producing preventable violence against the officers in some cases, and the destruction of evidence in others. Next to these social costs are the deterrence benefits. The value of deterrence depends on the strength of the incentive to commit the forbidden act. That incentive is minimal here, where ignoring knock-and-announce can realistically be expected to achieve nothing but the prevention of evidence destruction and avoidance of life-threatening resistance, dangers which suspend the requirement when there is "reasonable suspicion" that they exist, *Richards* v. *Wisconsin*, 520 U. S. 385, 394. Massive deterrence is hardly necessary. Contrary to Hudson's argument that without suppression there will be no deterrence, many forms of police misconduct are deterred by civil-rights suits, and by the consequences of increasing professionalism of police forces, including a new emphasis on internal police discipline. Pp. 8–13.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded in Part IV that *Segura* v. *United States*, 468 U. S. 796, *New York* v. *Harris*, 495 U. S. 14, and *United States* v. *Ramirez*, 523 U. S. 65, confirm the conclusion that suppression is unwarranted in this case. Pp. 13–16.

SCALIA, J., delivered the opinion of the Court with respect to Parts I, II, and III, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part IV, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1360

BOOKER T. HUDSON, JR., PETITIONER *v.* MICHIGAN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

[June 15, 2006]

JUSTICE SCALIA delivered the opinion of the Court, except as to Part IV.

We decide whether violation of the "knock-and-announce" rule requires the suppression of all evidence found in the search.

I

Police obtained a warrant authorizing a search for drugs and firearms at the home of petitioner Booker Hudson. They discovered both. Large quantities of drugs were found, including cocaine rocks in Hudson's pocket. A loaded gun was lodged between the cushion and armrest of the chair in which he was sitting. Hudson was charged under Michigan law with unlawful drug and firearm possession.

This case is before us only because of the method of entry into the house. When the police arrived to execute the warrant, they announced their presence, but waited only a short time—perhaps "three to five seconds," App. 15—before turning the knob of the unlocked front door and entering Hudson's home. Hudson moved to suppress all the inculpatory evidence, arguing that the premature entry violated his Fourth Amendment rights.

The Michigan trial court granted his motion. On interlocutory review, the Michigan Court of Appeals reversed, relying on Michigan Supreme Court cases holding that suppression is inappropriate when entry is made pursuant to warrant but without proper "'knock and announce.'" App. to Pet. for Cert. 4 (citing *People* v. *Vasquez*, 461 Mich. 235, 602 N. W. 2d 376 (1999) *(per curiam)*; *People* v. *Stevens*, 460 Mich. 626, 597 N. W. 2d 53 (1999)). The Michigan Supreme Court denied leave to appeal. 465 Mich. 932, 639 N. E. 2d 255 (2001). Hudson was convicted of drug possession. He renewed his Fourth Amendment claim on appeal, but the Court of Appeals rejected it and affirmed the conviction. App. to Pet. for Cert. 1–2. The Michigan Supreme Court again declined review. 472 Mich. 862, 692 N. W. 2d 385 (2005). We granted certiorari. 545 U. S. ___ (2005).

II

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See *Wilson* v. *Arkansas*, 514 U. S. 927, 931–932 (1995). Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law, see 40 Stat. 229, and is currently codified at 18 U. S. C. §3109. We applied that statute in *Miller* v. *United States*, 357 U. S. 301 (1958), and again in *Sabbath* v. *United States*, 391 U. S. 585 (1968). Finally, in *Wilson*, we were asked whether the rule was also a command of the Fourth Amendment. Tracing its origins in our English legal heritage, 514 U. S., at 931–936, we concluded that it was.

We recognized that the new constitutional rule we had announced is not easily applied. *Wilson* and cases following it have noted the many situations in which it is not necessary to knock and announce. It is not necessary when "circumstances presen[t] a threat of physical vio-

lence," or if there is "reason to believe that evidence would likely be destroyed if advance notice were given," *id.*, at 936, or if knocking and announcing would be "futile," *Richards* v. *Wisconsin*, 520 U. S. 385, 394 (1997). We require only that police "have a reasonable suspicion . . . under the particular circumstances" that one of these grounds for failing to knock and announce exists, and we have acknowledged that "[t]his showing is not high." *Ibid.*

When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds' wait are too few? Our "reasonable wait time" standard, see *United States* v. *Banks*, 540 U. S. 31, 41 (2003), is necessarily vague. *Banks* (a drug case, like this one) held that the proper measure was not how long it would take the resident to reach the door, but how long it would take to dispose of the suspected drugs—but that such a time (15 to 20 seconds in that case) would necessarily be extended when, for instance, the suspected contraband was not easily concealed. *Id.*, at 40–41. If our *ex post* evaluation is subject to such calculations, it is unsurprising that, *ex ante*, police officers about to encounter someone who may try to harm them will be uncertain how long to wait.

Happily, these issues do not confront us here. From the trial level onward, Michigan has conceded that the entry was a knock-and-announce violation. The issue here is remedy. *Wilson* specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement. 514 U. S., at 937, n. 4. That question is squarely before us now.

III

A

In *Weeks* v. *United States*, 232 U. S. 383 (1914), we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. We began applying the

same rule to the States, through the Fourteenth Amendment, in *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," *United States* v. *Leon*, 468 U. S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it, *Colorado* v. *Connelly*, 479 U. S. 157, 166 (1986), and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application," *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364–365 (1998) (citation omitted). We have rejected "[i]ndiscriminate application" of the rule, *Leon*, *supra*, at 908, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," *United States* v. *Calandra*, 414 U. S. 338, 348 (1974)—that is, "where its deterrence benefits outweigh its 'substantial social costs,'" *Scott*, *supra*, at 363 (quoting *Leon*, *supra*, at 907).

We did not always speak so guardedly. Expansive dicta in *Mapp*, for example, suggested wide scope for the exclusionary rule. See, *e.g.*, 367 U. S., at 655 ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"). *Whiteley* v. *Warden, Wyo. State Penitentiary*, 401 U. S. 560, 568–569 (1971), was to the same effect. But we have long since rejected that approach. As explained in *Arizona* v. *Evans*, 514 U. S. 1, 13 (1995): "In *Whiteley*, the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation. Subsequent case law has rejected this reflexive application of the exclusionary rule." (Citation omitted.) We had said as much in *Leon*, a decade earlier, when we explained that "[w]hether the exclusionary sanction is appropriately

imposed in a particular case, . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" 468 U. S., at 906 (quoting *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983)).

In other words, exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.'" *Segura* v. *United States*, 468 U. S. 796, 815 (1984). See also *id.*, at 829 (STEVENS, J., dissenting) ("We have not . . . mechanically applied the [exclusionary] rule to every item of evidence that has a causal connection with police misconduct"). Rather, but-for cause, or "causation in the logical sense alone," *United States* v. *Ceccolini*, 435 U. S. 268, 274 (1978), can be too attenuated to justify exclusion, *id.*, at 274–275. Even in the early days of the exclusionary rule, we declined to

> "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means suf-

> ficiently distinguishable to be purged of the primary taint.'" *Wong Sun* v. *United States*, 371 U. S. 471, 487–488 (1963) (quoting J. Maguire, Evidence of Guilt 221 (1959) (emphasis added)).

Attenuation can occur, of course, when the causal connection is remote. See, *e.g.*, *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *Ceccolini*, *supra*, at 279. Thus, in *New York* v. *Harris*, 495 U. S. 14 (1990), where an illegal warrantless arrest was made in Harris' house, we held that

> "suppressing [Harris'] statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated." *Id.*, at 20.

For this reason, cases excluding the fruits of unlawful warrantless searches, see, *e.g.*, *Boyd* v. *United States*, 116 U. S. 616 (1886); *Weeks*, 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); *Mapp*, *supra*, say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement. Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects," U. S. Const., Amdt. 4, from the government's scrutiny. Exclusion of the evidence obtained by a war-

rantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.

One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. See, *e.g.*, *McDonald* v. *United States*, 335 U. S. 451, 460–461 (1948) (Jackson, J., concurring). See also *Sabbath*, 391 U. S., at 589; *Miller*, 357 U. S., at 313, n. 12. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "'did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . . .'" *Wilson*, 514 U. S., at 931–932 (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195–196 (K. B. 1603)). The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." *Richards*, 520 U. S., at 393, n. 5. See also *Banks*, 540 U. S., at 41. And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police. *Richards*, 520 U. S., at 393, n. 5. "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." *Ibid.* In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

B

Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except "where its deterrence benefits outweigh its 'substantial social costs,'" *Scott*, 524 U. S., at 363 (quoting *Leon*, 468 U. S., at 907). The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule, and claims that any asserted *Richards* justification for a no-knock entry, see 520 U. S., at 394, had inadequate support. Cf. *United States* v. *Singleton*, 441 F. 3d 290, 293–294 (CA4 2006). The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that "[t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded." *Scott*, *supra*, at 366. Unlike the warrant or *Miranda* requirements, compliance with which is readily determined (either there was or was not a warrant; either the *Miranda* warning was given, or it was not), what constituted a "reasonable wait time" in a particular case, *Banks*, *supra*, at 41 (or, for that matter, how many seconds the police in fact waited), or whether there was "reasonable suspicion" of the sort that would invoke the *Richards* exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review.

Another consequence of the incongruent remedy Hudson proposes would be police officers' refraining from timely entry after knocking and announcing. As we have observed, see *supra*, at 3, the amount of time they must wait is necessarily uncertain. If the consequences of running

afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others. See *Gates*, 462 U. S., at 258. We deemed these consequences severe enough to produce our unanimous agreement that a mere "reasonable suspicion" that knocking and announcing "under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime," will cause the requirement to yield. *Richards*, *supra*, at 394.

Next to these "substantial social costs" we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. (It is not, of course, a sufficient condition: "[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." *Calandra*, 414 U. S., at 350; see also *Leon*, *supra*, at 910.) To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even "reasonable suspicion" of their existence, *suspend the knock-and-announce requirement anyway*. Massive deterrence is hardly required.

It seems to us not even true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all. Of course even if this assertion were accurate, it would not necessarily justify suppression. Assuming (as the assertion must) that civil

suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly "undeterred." When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only "effective deterrent"? And what, other than civil suit, is the "effective deterrent" of police violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes—and yet nothing but "ineffective" civil suit is available as a deterrent. And the police incentive for those violations is arguably greater than the incentive for disregarding the knock-and-announce rule.

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Dollree Mapp could not turn to 42 U. S. C. §1983 for meaningful relief; *Monroe* v. *Pape*, 365 U. S. 167 (1961), which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the §1983 remedy was extended to reach the deep pocket of municipalities, *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978). Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

Hudson complains that "it would be very hard to find a lawyer to take a case such as this," Tr. of Oral Arg. 7, but 42 U. S. C. §1988(b) answers this objection. Since some

civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." M. Avery, D. Rudovsky, & K. Blum, Police Misconduct: Law and Litigation, p. v (3d ed. 2005); see generally N. Aron, Liberty and Justice for All: Public Interest Law in the 1980s and Beyond (1989) (describing the growth of public-interest law). The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.

Hudson points out that few published decisions to date announce huge awards for knock-and-announce violations. But this is an unhelpful statistic. Even if we thought that only large damages would deter police misconduct (and that police somehow are deterred by "damages" but indifferent to the prospect of large §1988 attorney's fees), we do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury. It is clear, at least, that the lower courts are allowing colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity. See, *e.g.*, *Green* v. *Butler*, 420 F. 3d 689, 700–701 (CA7 2005) (denying qualified immunity in a knock-and-announce civil suit); *Holland ex rel. Overdorff* v. *Harrington*, 268 F. 3d 1179, 1193–1196 (CA10 2001) (same); *Mena* v. *Simi Valley*, 226 F. 3d 1031, 1041–1042 (CA9 2000) (same); *Gould* v. *Davis*, 165 F. 3d 265, 270–271 (CA4 1998) (same). As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other

contexts. See, *e.g.*, *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 70 (2001) ("[T]he threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity" (as violators of knock-and-announce do not)); see also *Nix* v. *Williams*, 467 U. S. 431, 446 (1984).

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to "assume" that unlawful police behavior would "be dealt with appropriately" by the authorities, *United States* v. *Payner*, 447 U. S. 727, 733–734, n. 5 (1980), but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers." S. Walker, Taming the System: The Control of Discretion in Criminal Justice 1950–1990, p. 51 (1993). Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. See, *e.g.*, D. Waksman & D. Goodman, The Search and Seizure Handbook (2d ed. 2006); A. Stone & S. DeLuca, Police Administration: An Introduction (2d ed. 1994); E. Thibault, L. Lynch, & R. McBridge, Proactive Police Management (4th ed. 1998). Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. See *Canton* v. *Harris*, 489 U. S. 378, 388 (1989). Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There is also evidence that the increasing use of various forms of citizen review can enhance police accountability.

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

IV

A trio of cases—*Segura* v. *United States*, 468 U. S. 796 (1984); *New York* v. *Harris*, 495 U. S. 14 (1990); and *United States* v. *Ramirez*, 523 U. S. 65 (1998)—confirms our conclusion that suppression is unwarranted in this case.

Like today's case, *Segura* involved a concededly illegal entry. Police conducting a drug crime investigation waited for Segura outside an apartment building; when he arrived, he denied living there. The police arrested him and brought him to the apartment where they suspected illegal activity. An officer knocked. When someone inside opened the door, the police entered, taking Segura with them. They had neither a warrant nor consent to enter, and they did not announce themselves as police—an entry as illegal as can be. Officers then stayed in the apartment for *19 hours* awaiting a search warrant. 468 U. S., at 800–801; *id.*, at 818–819 (STEVENS, J., dissenting). Once alerted that the search warrant had been obtained, the police—still inside, having secured the premises so that no evidence could be removed—conducted a search. *Id.*, at 801. We refused to exclude the resulting evidence. We recognized that only the evidence gained from the particular violation could be excluded, see *id.*, at 799, 804–805, and therefore distinguished the effects of the illegal entry from the effects of the legal search: "None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners'

apartment . . . ." *Id.*, at 814. It was therefore "beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged." *Ibid.*

If the search in *Segura* could be "wholly unrelated to the prior entry," *ibid.*, when the only entry was warrantless, it would be bizarre to treat more harshly the actions in this case, where the only entry was *with* a warrant. If the probable cause backing a warrant that was issued *later in time* could be an "independent source" for a search that proceeded after the officers illegally entered and waited, a search warrant obtained *before* going in must have at least this much effect.[1]

In the second case, *Harris*, the police violated the defendant's Fourth Amendment rights by arresting him at home without a warrant, contrary to *Payton* v. *New York*, 445 U. S. 573 (1980). Once taken to the station house, he gave an incriminating statement. See 495 U. S., at 15–16. We refused to exclude it. Like the illegal entry which led

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[1] JUSTICE BREYER's insistence that the warrant in *Segura* was "obtained independently without use of any information found during the illegal entry," *post*, at 14 (dissenting opinion), entirely fails to distinguish it from the warrant in the present case. Similarly inapposite is his appeal to Justice Frankfurter's statement in *Wolf* v. *Colorado*, 338 U. S. 25, 28 (1949), that the "knock at the door, . . . as a prelude to a search, without authority of law . . . [is] inconsistent with the conception of human rights enshrined in [our] history," see *post*, at 17. "How much the more offensive," JUSTICE BREYER asserts, "when the search takes place without any knock at all." *Ibid.* But a no-knock entry "without authority of law" (*i.e.*, without a search warrant) describes not this case, but *Segura*—where the evidence was admitted anyway.

JUSTICE BREYER's assertion that *Segura*, unlike our decision in the present case, had no effect on deterrence, see *post*, at 23, does not comport with the views of the *Segura* dissent. See, *e.g.*, 468 U. S., at 817 (STEVENS, J., dissenting) ("The Court's disposition, I fear, will provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home").

to discovery of the evidence in today's case, the illegal arrest in *Harris* began a process that culminated in acquisition of the evidence sought to be excluded. While Harris's statement was "the product of an arrest and being in custody," it "was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id.*, at 20. Likewise here: While acquisition of the gun and drugs was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock and announce.[2]

United States v. *Ramirez*, *supra*, involved a claim that police entry violated the Fourth Amendment because it was effected by breaking a window. We ultimately concluded that the property destruction was, under all the circumstances, reasonable, but in the course of our discussion we unanimously said the following: "[D]estruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." *Id.*, at 71. Had the breaking of the window been unreasonable, the Court said, it would have been necessary to determine whether there had been a "sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence." *Id.*, at 72, n. 3. What clearer expression could there be of the proposition that an

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[2] *Harris* undermines two key points of the dissent. First, the claim that "whether the interests underlying the knock-and-announce rule are implicated in any given case is, in a sense, beside the point," *post*, at 18. This is flatly refuted by *Harris*'s plain statement that the reason for a rule must govern the sanctions for the rule's violation. 495 U. S., at 17, 20; see also *supra*, at 6. Second, the dissent's attempt to turn *Harris* into a vindication of the sanctity of the home, see *post*, at 24. The whole point of the case was that a confession that police obtained by illegally removing a man from the sanctity of his home was admissible against him.

impermissible manner of entry does not necessarily trigger the exclusionary rule?

* * *

For the foregoing reasons we affirm the judgment of the Michigan Court of Appeals.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–1360

BOOKER T. HUDSON, JR., PETITIONER *v.* MICHIGAN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

[June 15, 2006]

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

Two points should be underscored with respect to today's decision. First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order. See *Wilson* v. *Arkansas*, 514 U. S. 927, 934 (1995). The Court's decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law's concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.

As to the basic right in question, privacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginnings of the Republic. This common understanding ensures respect for the law and allegiance to our institutions, and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force. It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt.

Our system, as the Court explains, has developed procedures for training police officers and imposing discipline for failures to act competently and lawfully. If those measures prove ineffective, they can be fortified with more detailed regulations or legislation. Supplementing these safeguards are civil remedies, such as those available under 42 U. S. C. §1983, that provide restitution for discrete harms. These remedies apply to all violations, including, of course, exceptional cases in which unannounced entries cause severe fright and humiliation.

Suppression is another matter. Under our precedents the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression. Cf. *United States* v. *Ramirez*, 523 U. S. 65, 72, n. 3 (1998) (application of the exclusionary rule depends on the existence of a "sufficient causal relationship" between the unlawful conduct and the discovery of evidence). When, for example, a violation results from want of a 20-second pause but an ensuing, lawful search lasting five hours discloses evidence of criminality, the failure to wait at the door cannot properly be described as having caused the discovery of evidence.

Today's decision does not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern. Even then, however, the Court would have to acknowledge that extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits our discretion in applying the exclusionary rule. That type of extension also would have significant practical implications, adding to the list of issues requiring resolution at the criminal trial questions such as whether police officers entered a

home after waiting 10 seconds or 20.

In this case the relevant evidence was discovered not because of a failure to knock-and-announce, but because of a subsequent search pursuant to a lawful warrant. The Court in my view is correct to hold that suppression was not required. While I am not convinced that *Segura* v. *United States*, 468 U. S. 796 (1984), and *New York* v. *Harris*, 495 U. S. 14 (1990), have as much relevance here as JUSTICE SCALIA appears to conclude, the Court's holding is fully supported by Parts I through III of its opinion. I accordingly join those Parts and concur in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 04–1360

BOOKER T. HUDSON, JR., PETITIONER *v.* MICHIGAN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

[June 15, 2006]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

In *Wilson* v. *Arkansas*, 514 U. S. 927 (1995), a unanimous Court held that the Fourth Amendment normally requires law enforcement officers to knock and announce their presence before entering a dwelling. Today's opinion holds that evidence seized from a home following a violation of this requirement need not be suppressed

As a result, the Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks* v. *United States*, 232 U. S. 383 (1914). See Appendix, *infra*.

Today's opinion is thus doubly troubling. It represents a significant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection.

I

This Court has set forth the legal principles that ought to have determined the outcome of this case in two sets of basic Fourth Amendment cases. I shall begin by describ-

ing that underlying case law.

A

The first set of cases describes the constitutional knock-and-announce requirement, a requirement that this Court initially set forth only 11 years ago in *Wilson* v. *Arkansas*, *supra*. Cf. *Sabbath* v. *United States*, 391 U. S. 585 (1968) (suppressing evidence seized in violation of federal statutory knock-and-announce requirement); *Miller* v. *United States*, 357 U. S. 301 (1958) (same). In *Wilson*, tracing the lineage of the knock-and-announce rule back to the 13th century, 514 U. S., at 932, we wrote that

> "[a]n examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Id.*, at 931.

We noted that this "basic principle" was agreed upon by "[s]everal prominent founding-era commentators," *id.*, at 932, and "was woven quickly into the fabric of early American law" via state constitutions and statutes, *id.*, at 933. We further concluded that there was

> "little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Id.*, at 934.

And we held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Id.*, at 929. Thus, "a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement." *Id.*, at 936; see *United States* v. *Banks*, 540 U. S. 31, 36 (2003); *United States* v. *Ramirez*, 523 U. S. 65, 70 (1998); *Richards* v. *Wisconsin*, 520 U. S. 385, 387 (1997).

B

The second set of cases sets forth certain well-established principles that are relevant here. They include:

Boyd v. *United States*, 116 U. S. 616 (1886). In this seminal Fourth Amendment case, decided 120 years ago, the Court wrote, in frequently quoted language, that the Fourth Amendment's prohibitions apply

> "to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property." *Id.*, at 630.

Weeks, *supra*. This case, decided 28 years after *Boyd*, originated the exclusionary rule. The Court held that the Federal Government could not retain evidence seized unconstitutionally and use that evidence in a federal criminal trial. The Court pointed out that "[i]f letters and private documents" could be unlawfully seized from a home "and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution." 232 U. S., at 393.

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 (1920). This case created an exception to (or a qualification of) *Weeks*' exclusionary rule. The Court held that the Government could not use information obtained during an illegal search to subpoena documents that they illegally viewed during that search. Writing for the Court, Justice Holmes noted that the exclusionary rule "does not mean that the facts [unlawfully] obtained become sacred and inaccessible. If knowledge of them is gained from an

independent source they may be proved like any others . . . ." 251 U. S., at 392. *Silverthorne* thus stands for the proposition that the exclusionary rule does not apply if the evidence in question (or the "fruits" of that evidence) was obtained through a process unconnected with, and untainted by, the illegal search. Cf. *Nix* v. *Williams*, 467 U. S. 431, 444 (1984) (describing related "inevitable discovery" exception).

Wolf v. *Colorado*, 338 U. S. 25 (1949), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Both of these cases considered whether *Weeks*' exclusionary rule applies to the States. In *Wolf*, the Court held that it did not. It said that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S., at 27–28. But the Court held that the exclusionary rule is not enforceable against the States as "an essential ingredient of the right." *Id.*, at 29. In *Mapp*, the Court overruled *Wolf*. Experience, it said, showed that alternative methods of enforcing the Fourth Amendment's requirements had failed. See 367 U. S., at 651–653; see, *e.g.*, *People* v. *Cahan*, 44 Cal. 2d 434, 447, 282 P. 2d 905, 913 (1955) (Traynor, C. J.) ("Experience [in California] has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures"). The Court consequently held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp*, 367 U. S., at 655. "To hold otherwise," the Court added, would be "to grant the right but in reality to withhold its privilege and enjoyment." *Id.*, at 656.

II

Reading our knock-and-announce cases, Part I–A, *supra*, in light of this foundational Fourth Amendment case

law, Part I–B, *supra*, it is clear that the exclusionary rule should apply. For one thing, elementary logic leads to that conclusion. We have held that a court must "conside[r]" whether officers complied with the knock-and-announce requirement "in assessing the reasonableness of a search or seizure." *Wilson*, 514 U. S., at 934 (emphasis added); see *Banks*, 540 U. S., at 36. The Fourth Amendment insists that an unreasonable search or seizure is, constitutionally speaking, an illegal search or seizure. And ever since *Weeks* (in respect to federal prosecutions) and *Mapp* (in respect to state prosecutions), "the use of evidence secured through an illegal search and seizure" is "barred" in criminal trials. *Wolf*, *supra*, at 28 (citing *Weeks*); see *Mapp*, *supra*, at 655.

For another thing, the driving legal purpose underlying the exclusionary rule, namely, the deterrence of unlawful government behavior, argues strongly for suppression. See *Elkins* v. *United States*, 364 U. S. 206, 217 (1960) (purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it"). In *Weeks*, *Silverthorne*, and *Mapp*, the Court based its holdings requiring suppression of unlawfully obtained evidence upon the recognition that admission of that evidence would seriously undermine the Fourth Amendment's promise. All three cases recognized that failure to apply the exclusionary rule would make that promise a hollow one, see *Mapp*, *supra*, at 657, reducing it to "a form of words," *Silverthorne*, *supra*, at 392, "of no value" to those whom it seeks to protect, *Weeks*, *supra*, at 393. Indeed, this Court in *Mapp* held that the exclusionary rule applies to the States in large part due to its belief that alternative state mechanisms for enforcing the Fourth Amendment's guarantees had proved "worthless and futile." 367 U. S., at 652.

Why is application of the exclusionary rule any the less necessary here? Without such a rule, as in *Mapp*, police

know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry. As in *Mapp*, some government officers will find it easier, or believe it less risky, to proceed with what they consider a necessary search immediately and without the requisite constitutional (say, warrant or knock-and-announce) compliance. Cf. Mericli, The Apprehension of Peril Exception to the Knock and Announce Rule—Part I, 16 Search and Seizure L. Rep. 129, 130 (1989) (hereinafter Mericili) (noting that some "[d]rug enforcement authorities believe that safety for the police lies in a swift, surprising entry with overwhelming force—not in announcing their official authority").

Of course, the State or the Federal Government may provide alternative remedies for knock-and-announce violations. But that circumstance was true of *Mapp* as well. What reason is there to believe that those remedies (such as private damages actions under 42 U. S. C. §1983), which the Court found inadequate in *Mapp*, can adequately deter unconstitutional police behavior here? See Kamisar, In Defense of the Search and Seizure Exclusionary Rule, 26 Harv. J. L. & Pub. Pol'y 119, 126–129 (2003) (arguing that "five decades of post-*Weeks* 'freedom' from the inhibiting effect of the federal exclusionary rule failed to produce any meaningful alternative to the exclusionary rule in any jurisdiction" and that there is no evidence that "times have changed" post-*Mapp*).

The cases reporting knock-and-announce violations are legion. See, *e.g.*, 34 Geo. L. J. Ann. Rev. Crim. Proc. 31–35 (2005) (collecting court of appeals cases); Annot., 85 A. L. R. 5th 1 (2001) (collecting state-court cases); Brief for Petitioner 16–17 (collecting federal and state cases). Indeed, these cases of reported violations seem sufficiently frequent and serious as to indicate "a widespread pattern." *Ante*, at 2 (KENNEDY, J., concurring in part and concurring in judgment). Yet the majority, like Michigan and the

United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation. Even Michigan concedes that, "in cases like the present one . . . , damages may be virtually non-existent." Brief for Respondent 35, n. 66; And Michigan's *amici* further concede that civil immunities prevent tort law from being an effective substitute for the exclusionary rule at this time. Brief for Criminal Justice Legal Foundation 10; see also *Hope* v. *Pelzer*, 536 U. S. 730, 739 (2002) (difficulties of overcoming qualified immunity defenses).

As Justice Stewart, the author of a number of significant Fourth Amendment opinions, explained, the deterrent effect of damage actions "can hardly be said to be great," as such actions are "expensive, time-consuming, not readily available, and rarely successful." Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1388 (1983). The upshot is that the need for deterrence—the critical factor driving this Court's Fourth Amendment cases for close to a century—argues with at least comparable strength for evidentiary exclusion here.

To argue, as the majority does, that new remedies, such as 42 U. S. C. §1983 actions or better trained police, make suppression unnecessary is to argue that *Wolf*, not *Mapp*, is now the law. (The Court recently rejected a similar argument in *Dickerson* v. *United States*, 530 U. S. 428, 441–442 (2000).) To argue that there may be few civil suits because violations may produce nothing "more than nominal injury" is to confirm, not to deny, the inability of civil suits to deter violations. See *ante*, at 11. And to argue without evidence (and despite myriad reported cases of violations, no reported case of civil damages, and Michigan's concession of their nonexistence) that civil suits may provide deterrence because claims *may* "have been settled"

is, perhaps, to search in desperation for an argument. See *ibid.* Rather, the majority, as it candidly admits, has simply "assumed" that, "[a]s far as [it] know[s], civil liability is an effective deterrent," *ibid.*, a support-free assumption that *Mapp* and subsequent cases make clear does not embody the Court's normal approach to difficult questions of Fourth Amendment law.

It is not surprising, then, that after looking at virtually every pertinent Supreme Court case decided since *Weeks*, I can find no precedent that might offer the majority support for its contrary conclusion. The Court has, of course, recognized that not every Fourth Amendment violation necessarily triggers the exclusionary rule. *Ante*, at 4–5; cf. *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983) (application of the exclusionary rule is a separate question from whether the Fourth Amendment has been violated). But the class of Fourth Amendment violations that do not result in suppression of the evidence seized, however, is limited.

The Court has declined to apply the exclusionary rule only:

> (1) where there is a specific reason to believe that application of the rule would "not result in appreciable deterrence," *United States* v. *Janis*, 428 U. S. 433, 454 (1976); see, *e.g.*, *United States* v. *Leon*, 468 U. S. 897, 919–920 (1984) (exception where searching officer executes defective search warrant in "good faith"); *Arizona* v. *Evans*, 514 U. S. 1, 14 (1995) (exception for clerical errors by court employees); *Walder* v. *United States*, 347 U. S. 62 (1954) (exception for impeachment purposes), or
>
> (2) where admissibility in proceedings other than criminal trials was at issue, see, *e.g.*, *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364 (1998) (exception for parole revocation proceedings); *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1050

(1984) (plurality opinion) (exception for deportation proceedings); *Janis*, *supra*, at 458 (exception for civil tax proceedings); *United States* v. *Calandra*, 414 U. S. 338, 348–350 (1974) (exception for grand jury proceedings); *Stone* v. *Powell*, 428 U. S. 465, 493–494 (1976) (exception for federal habeas proceedings).

Neither of these two exceptions applies here. The second does not apply because this case is an ordinary criminal trial. The first does not apply because (1) officers who violate the rule are not acting "as a reasonable officer would and should act in similar circumstances," *Leon*, *supra*, at 920, (2) this case does not involve government employees other than police, *Evans*, *supra*, and (3), most importantly, the key rationale for any exception, "lack of deterrence," is missing, see *Pennsylvania Bd. of Probation*, *supra*, at 364 (noting that the rationale for not applying the rule in noncriminal cases has been that the deterrence achieved by having the rule apply in those contexts is "minimal" *because* "application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches"); *Michigan* v. *Tucker*, 417 U. S. 433, 447 (1974) (noting that deterrence rationale would not be served if rule applied to police officers acting in good faith, as the "deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct"). That critical latter rationale, which underlies *every* exception, does not apply here, as there is no reason to think that, in the case of knock-and-announce violations by the police, "the exclusion of evidence at trial would not sufficiently deter future errors," *Evans*, *supra*, at 14, or "'further the ends of the exclusionary rule in any appreciable way,'" *Leon*, *supra*, at 919–920.

I am aware of no other basis for an exception. The Court has decided more than 300 Fourth Amendment

cases since *Weeks*. The Court has found constitutional violations in nearly a third of them. See W. Greenhalgh, The Fourth Amendment Handbook: A Chronological Survey of Supreme Court Decisions 27–130 (2d ed. 2003) (collecting and summarizing 332 post-*Weeks* cases decided between 1914 and 2002). The nature of the constitutional violation varies. In most instances officers lacked a warrant; in others, officers possessed a warrant based on false affidavits; in still others, the officers executed the search in an unconstitutional manner. But in every case involving evidence seized during an illegal search of a home (federally since *Weeks*, nationally since *Mapp*), the Court, with the exceptions mentioned, has either explicitly or implicitly upheld (or required) the suppression of the evidence at trial. See Appendix, *infra*. In not one of those cases did the Court "questio[n], in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the State's case" in a criminal trial. *Franks* v. *Delaware*, 438 U. S. 154, 171 (1978).

I can find nothing persuasive in the majority's opinion that could justify its refusal to apply the rule. It certainly is not a justification for an exception here (as the majority finds) to find odd instances in *other* areas of law that do not automatically demand suppression. *Ante*, at 10 (suspect confesses, police beat him up *afterwards;* suspect confesses, *then* police apparently arrest him, take him to station, and refuse to tell him of his right to counsel). Nor can it justify an exception to say that *some* police may knock at the door anyway (to avoid being mistaken for a burglar), for other police (believing quick entry is the most secure, effective entry) will not voluntarily do so. Cf. Mericli 130 (describing Special Weapons and Tactics (SWAT) team practices); R. Balko, No SWAT (Apr. 6, 2006), available at http://www.cato.org/pub_display.php?pub_id=6344 (all In-

ternet materials as visited June 7, 2006, and available in Clerk of Court's case file).

Neither can the majority justify its failure to respect the need for deterrence, as set forth consistently in the Court's prior case law, through its claim of "substantial social costs"—at least if it means that those "social costs" are somehow special here. The only costs it mentions are those that typically accompany *any* use of the Fourth Amendment's exclusionary principle: (1) that where the constable blunders, a guilty defendant may be set free (consider *Mapp* itself); (2) that defendants may assert claims where Fourth Amendment rights are uncertain (consider the Court's qualified immunity jurisprudence), and (3) that sometimes it is difficult to decide the merits of those uncertain claims. See *ante*, at 8–9. In fact, the "no-knock" warrants that are provided by many States, by diminishing uncertainty, may make application of the knock-and-announce principle less "cost[ly]" on the whole than application of comparable Fourth Amendment principles, such as determining whether a particular warrantless search was justified by exigency. The majority's "substantial social costs" argument is an argument against the Fourth Amendment's exclusionary principle itself. And it is an argument that this Court, until now, has consistently rejected.

III

The majority, Michigan, and the United States make several additional arguments. In my view, those arguments rest upon misunderstandings of the principles underlying this Court's precedents.

A

The majority first argues that "the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence." *Ante*, at 5. But taking causa-

tion as it is commonly understood in the law, I do not see how that can be so. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 266 (5th ed. 1984). Although the police might have entered Hudson's home lawfully, they did not in fact do so. Their unlawful behavior inseparably characterizes their actual entry; that entry was a necessary condition of their presence in Hudson's home; and their presence in Hudson's home was a necessary condition of their finding and seizing the evidence. At the same time, their discovery of evidence in Hudson's home was a readily foreseeable consequence of their entry and their unlawful presence within the home. Cf. 2 Restatement (Second) of Torts §435 (1963–1964).

Moreover, separating the "manner of entry" from the related search slices the violation too finely. As noted, Part I–A, *supra*, we have described a failure to comply with the knock-and-announce rule, not as an independently unlawful event, but as a factor that renders the *search* "constitutionally defective." *Wilson*, 514 U. S., at 936; see also *id.*, at 934 (compliance with the knock-and-announce requirement is one of the "factors to be considered in assessing the *reasonableness of a search or seizure*" (emphasis added)); *Ker* v. *California*, 374 U. S. 23, 53 (1963) (opinion of Brennan, J.) ("[A] lawful entry is the indispensable predicate of a reasonable search").

The Court nonetheless accepts Michigan's argument that the requisite but-for-causation is not satisfied in this case because, whether or not the constitutional violation occurred (what the Court refers to as a "preliminary misstep"), "the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." *Ante*, at 5. As support for this proposition, Michigan rests on this Court's inevitable discovery cases.

This claim, however, misunderstands the inevitable

discovery doctrine. Justice Holmes in *Silverthorne*, in discussing an "independent source" exception, set forth the principles underlying the inevitable discovery rule. See *supra*, at 4. That rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place. Rather, "independent" or "inevitable" discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one. See, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U. S. 443, 450–451 (1971). Instead, it must show that the same evidence "inevitably *would* have been discovered *by lawful means*." *Nix* v. *Williams*, 467 U. S., at 444 (emphasis added). "What a man *could* do is not at all the same as what he *would* do." Austin, Ifs And Cans, 42 Proceedings of the British Academy 109, 111–112 (1956).

The inevitable discovery exception rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a "later, *lawful* seizure" that is "*genuinely independent* of an earlier, tainted one." *Murray* v. *United States*, 487 U. S. 533, 542 (1988) (emphasis added); see also *id.*, at 545 (Marshall, J., joined by STEVENS and O'Connor, JJ., dissenting) ("When the seizure of the evidence at issue is 'wholly independent of the constitutional violation, then exclusion arguably will have no effect on a law enforcement officer's incentive to commit an unlawful search").

Case law well illustrates the meaning of this principle. In *Nix*, *supra*, police officers violated a defendant's Sixth

Amendment right by eliciting incriminating statements from him after he invoked his right to counsel. Those statements led to the discovery of the victim's body. The Court concluded that evidence obtained from the victim's body was admissible because it would ultimately or inevitably have been discovered by a volunteer search party effort that was ongoing—whether or not the Sixth Amendment violation had taken place. *Id.*, at 449. In other words, the evidence would have been found *despite*, and *independent of*, the Sixth Amendment violation.

In *Segura* v. *United States*, 468 U. S. 796 (1984), one of the "trio of cases" JUSTICE SCALIA says "confirms [the Court's] conclusion," *ante*, at 13, the Court held that an earlier illegal entry into an apartment did not require suppression of evidence that police later seized when executing a search warrant obtained on the basis of information unconnected to the initial entry. The Court reasoned that the "evidence was discovered the day following the entry, *during the search conducted under a valid warrant*"—*i.e.*, a warrant obtained independently without use of any information found during the illegal entry—and that "it was the product of *that* search, wholly unrelated to the prior [unlawful] entry." *Segura*, *supra*, at 814 (emphasis added).

In *Murray*, *supra*, the Court upheld the admissibility of seized evidence where agents entered a warehouse without a warrant, and then later returned with a valid warrant that was not obtained on the basis of evidence observed during the first (illegal) entry. The Court reasoned that while the agents' "[k]nowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry . . . it was *also* acquired at the time of entry pursuant to the warrant, and *if that later acquisition was not the result of the earlier entry* there is no reason why the independent source doctrine should not apply." *Id.*, at 541 (emphasis added).

Thus, the Court's opinion reflects a misunderstanding of what "inevitable discovery" means when it says, "[i]n this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence." *Ante*, at 5. The majority rests this conclusion on its next statement: "Whether that preliminary misstep has occurred *or not*, the police . . . would have discovered the gun and the drugs inside the house." *Ibid.* Despite the phrase "of course," neither of these statements is correct. It is not true that, had the illegal entry not occurred, "police would have discovered the guns and drugs inside the house." Without that unlawful entry they would not have been inside the house; so there would have been no discovery. See *supra*, at 12.

Of course, had the police entered the house lawfully, they would have found the gun and drugs. But that fact is beside the point. The question is not what police might have done had they not behaved unlawfully. The question is what they did do. Was there set in motion an independent chain of events that would have inevitably led to the discovery and seizure of the evidence despite, and independent of, that behavior? The answer here is "no."

B

The majority, Michigan, and the United States point out that the officers here possessed a warrant authorizing a search. *Ante*, at 5. That fact, they argue, means that the evidence would have been discovered independently or somehow diminishes the need to suppress the evidence. But I do not see why that is so. The warrant in question was not a "no-knock" warrant, which many States (but not Michigan) issue to assure police that a prior knock is not necessary. *Richards*, 520 U. S., at 396, n. 7 (collecting state statutes). It did not authorize a search that fails to comply with knock-and-announce requirements. Rather, it was an ordinary search warrant. It authorized a search

that *complied with*, not a search that *disregarded*, the Constitution's knock-and-announce rule.

Would a warrant that authorizes entry into a home on Tuesday permit the police to enter on Monday? Would a warrant that authorizes entry during the day authorize the police to enter during the middle of the night? It is difficult for me to see how the presence of a warrant that does not authorize the entry in question has anything to do with the "inevitable discovery" exception or otherwise diminishes the need to enforce the knock-and-announce requirement through suppression.

C

The majority and the United States set forth a policy-related variant of the causal connection theme: The United States argues that the law should suppress evidence only insofar as a Fourth Amendment violation causes the kind of harm that the particular Fourth Amendment rule seeks to protect against. It adds that the constitutional purpose of the knock-and-announce rule is to prevent needless destruction of property (such as breaking down a door) and to avoid unpleasant surprise. And it concludes that the exclusionary rule should suppress evidence of, say, damage to property, the discovery of a defendant in an "intimate or compromising moment," or an excited utterance from the occupant caught by surprise, but nothing more. Brief for United States as *Amicus Curiae* 12, 28.

The majority makes a similar argument. It says that evidence should not be suppressed once the causal connection between unlawful behavior and discovery of the evidence becomes too "attenuated." *Ante*, at 5. But the majority then makes clear that it is not using the word "attenuated" to mean what this Court's precedents have typically used that word to mean, namely, that the discovery of the evidence has come about long after the unlawful

behavior took place or in an independent way, *i.e.*, through "'means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun* v. *United States*, 371 U. S. 471, 487–488 (1963); see *Brown* v. *Illinois*, 422 U. S. 590, 603–604 (1975).

Rather, the majority gives the word "attenuation" a new meaning (thereby, in effect, making the same argument as the United States). "Attenuation," it says, "also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Ante*, at 6. The interests the knock-and-announce rule seeks to protect, the Court adds, are "human life" (at stake when a householder is "surprised"), "property" (such as the front door), and "those elements of privacy and dignity that can be destroyed by a sudden entrance," namely, "the opportunity to collect oneself before answering the door." *Ante*, at 7. Since none of those interests led to the discovery of the evidence seized here, there is no reason to suppress it.

There are three serious problems with this argument. First, it does not fully describe the constitutional values, purposes, and objectives underlying the knock-and-announce requirement. That rule does help to protect homeowners from damaged doors; it does help to protect occupants from surprise. But it does more than that. It protects the occupants' privacy by assuring them that government agents will not enter their home without complying with those requirements (among others) that diminish the offensive nature of any such intrusion. Many years ago, Justice Frankfurter wrote for the Court that the "knock at the door, . . . as a prelude to a search, without authority of law . . . [is] inconsistent with the conception of human rights enshrined in [our] history" and Constitution. *Wolf*, 338 U. S., at 28. How much the more offensive when the search takes place without any knock

at all. Cf. *Wilson*, 514 U. S., at 931 (knock-and-announce rule recognizes that "the common law generally protected a man's house as 'his castle of defence and asylum' " (quoting 3 W. Blackstone, Commentaries *288)); *Miller*, 357 U. S., at 313 (federal knock-and-announce statute "codi-f[ied] a tradition embedded in Anglo-American law" that reflected "the reverence of the law for the individual's right of privacy in his house").

Over a century ago this Court wrote that "it is not the breaking of his doors" that is the "essence of the offence," but the "invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life." *Boyd*, 116 U. S., at 630. And just this Term we have reiterated that "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Georgia* v. *Randolph*, 547 U. S. ___, ___ (2006) (slip op., at 10) (quoting *Minnesota* v. *Carter*, 525 U. S. 83, 99 (1998) (KENNEDY, J., concurring)). The knock-and-announce requirement is no less a part of the "centuries-old principle" of special protection for the privacy of the home than the warrant requirement. See 547 U. S., at ___ (slip op., at 10) (citing *Miller*, *supra*, at 307). The Court is therefore wrong to reduce the essence of its protection to "the right not to be intruded upon in one's nightclothes." *Ante*, at 10; see *Richards*, 520 U. S., at 393, n. 5 ("[I]ndividual privacy interest[s]" protected by the rule are "not inconsequential" and "should not be unduly minimized").

Second, whether the interests underlying the knock-and-announce rule are implicated in any given case is, in a sense, beside the point. As we have explained, failure to comply with the knock-and-announce rule renders the related search unlawful. *Wilson*, *supra*, at 936. And where a search is unlawful, the law insists upon suppression of the evidence consequently discovered, even if that evidence or its possession has little or nothing to do with

the reasons underlying the unconstitutionality of a search. The Fourth Amendment does not seek to protect contraband, yet we have required suppression of contraband seized in an unlawful search. See, *e.g.*, *Kyllo* v. *United States*, 533 U. S. 27, 40 (2001); *Coolidge*, 403 U. S., at 473. That is because the exclusionary rule protects more general "privacy values through deterrence of future police misconduct." *James* v. *Illinois*, 493 U. S. 307, 319 (1990). The same is true here.

Third, the majority's interest-based approach departs from prior law. Ordinarily a court will simply look to see if the unconstitutional search produced the evidence. The majority does not refer to any relevant case in which, beyond that, suppression turned on the far more detailed relation between, say, (1) a particular materially false statement made to the magistrate who issued a (consequently) invalid warrant and (2) evidence found after a search with that warrant. But cf. *ante*, at 15, n. 2 (plurality opinion) (citing *New York* v. *Harris*, 495 U. S. 14 (1990), as such a case in section of opinion that JUSTICE KENNEDY does not join). And the majority's failure does not surprise me, for such efforts to trace causal connections at retail could well complicate Fourth Amendment suppression law, threatening its workability.

D

The United States, in its brief and at oral argument, has argued that suppression is "an especially harsh remedy given the nature of the violation in this case." Brief for United States as *Amicus Curiae* 28; see also *id.*, at 24. This argument focuses upon the fact that entering a house after knocking and announcing can, in some cases, prove dangerous to a police officer. Perhaps someone inside has a gun, as turned out to be the case here. The majority adds that police officers about to encounter someone who may try to harm them will be "uncertain" as to how long to

wait. *Ante*, at 9. It says that, "[i]f the consequences of running afoul" of the knock-and-announce "rule were so massive," *i.e.*, would lead to the exclusion of evidence, then "officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases." *Ante*, at 8–9.

To argue that police efforts to assure compliance with the rule may prove dangerous, however, is not to argue against evidence suppression. It is to argue against the validity of the rule itself. Similarly, to argue that enforcement means uncertainty, which in turn means the potential for dangerous and longer-than-necessary delay, is (if true) to argue against meaningful compliance with the rule.

The answer to the first argument is that the rule itself does not require police to knock or to announce their presence where police have a "reasonable suspicion" that doing so "would be dangerous or futile" or "would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards*, *supra*, at 394; see *Banks*, 540 U. S., at 36–37; *Wilson*, *supra*, at 935–936.

The answer to the second argument is that States can, and many do, reduce police uncertainty while assuring a neutral evaluation of concerns about risks to officers or the destruction of evidence by permitting police to obtain a "no-knock" search warrant from a magistrate judge, thereby assuring police that a prior announcement is not necessary. *Richards*, 520 U. S., at 396, n. 7 (collecting state statutes). While such a procedure cannot remove all uncertainty, it does provide an easy way for officers to comply with the knock-and-announce rule.

Of course, even without such a warrant, police maintain the backup "authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed." *Ibid.* "[I]f circumstances support a reasonable suspicion of exigency when the offi-

cers arrive at the door, they may go straight in." *Banks*, *supra*, at 37. And "[r]easonable suspicion is a less demanding standard than probable cause . . . ." *Alabama* v. *White*, 496 U. S. 325, 330 (1990); see *Terry* v. *Ohio*, 392 U. S. 1, 21–22 (1968) (no Fourth Amendment violation under the reasonable suspicion standard if "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate").

Consider this very case. The police obtained a search warrant that authorized a search, not only for drugs, but also for *guns*. App. 5. If probable cause justified a search for guns, why would it not also have justified a no-knock warrant, thereby diminishing any danger to the officers? Why (in a State such as Michigan that lacks no-knock warrants) would it not have justified the very no-knock entry at issue here? Indeed, why did the prosecutor not argue in this very case that, given the likelihood of guns, the no-knock entry was lawful? From what I have seen in the record, he would have won. And had he won, there would have been no suppression here.

That is the right way to win. The very process of arguing the merits of the violation would help to clarify the contours of the knock-and-announce rule, contours that the majority believes are too fuzzy. That procedural fact, along with no-knock warrants, back up authority to enter without knocking regardless, and use of the "reasonable suspicion" standard for doing so should resolve the government's problems with the knock-and-announce rule while reducing the "uncertain[ty]" that the majority discusses to levels beneath that found elsewhere in Fourth Amendment law (*e.g.*, exigent circumstances). *Ante*, at 8. Regardless, if the Court fears that effective enforcement of a constitutional requirement will have harmful consequences, it should face those fears directly by addressing the requirement itself. It should not argue, "the require-

ment is fine, indeed, a serious matter, just don't enforce it."

E

It should be apparent by now that the three cases upon which JUSTICE SCALIA relies—*Segura* v. *United States*, 468 U. S. 796; *New York* v. *Harris*, 495 U. S. 14; and *Ramirez*, 523 U. S. 65—do not support his conclusion. See *ante*, at 13–15. Indeed, JUSTICE KENNEDY declines to join this section of the lead opinion because he fails to see the relevance of *Segura* and *Harris*, though he does rely on *Ramirez*. *Ante*, at 3 (opinion concurring in part and concurring in judgment).

JUSTICE SCALIA first argues that, if the "search in *Segura* could be 'wholly unrelated to the prior entry, . . . when the only entry was warrantless, it would be bizarre to treat more harshly the actions in this case, where the only entry was *with* a warrant." *Ante*, at 14. Then it says that, "[i]f the probable cause backing a warrant that was issued *later in time* could be an 'independent source' for a search that proceeded after the officers illegally entered and waited, a search warrant obtained *before* going in must have at least this much effect." *Ibid.* I do not understand these arguments. As I have explained, the presence of a warrant that did not authorize a search that fails to comply with knock-and-announce requirements is beside the point. See Part III–B, *supra*. And the timing of the warrant in *Segura* made no difference to the case. The relevant fact about the warrant there was that it was lawfully obtained and arguably set off an independent chain of events that led the police to seize the evidence. 468 U. S., at 814; see also *id.*, at 814–815 ("The valid warrant search was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the entry" (citations omitted)). As noted, there is no such independent event, or intervening chain of events that would purge

the taint of the illegal entry, present here. See *supra*, at 15. The search that produced the relevant evidence here is the very search that the knock-and-announce violation rendered unlawful. There simply is no "independent source."

As importantly, the Court in *Segura* said nothing to suggest it intended to create a major exclusionary rule exception, notwithstanding the impact of such an exception on deterrence. Indeed, such an exception would be inconsistent with a critical rationale underlying the independent source and inevitable discovery rules, which was arguably available in *Segura*, and which is clearly absent here. That rationale concerns deterrence. The threat of inadmissibility deters unlawful police behavior; and the existence of an exception applicable where evidence is found through an untainted independent route will rarely undercut that deterrence. That is because the police can rarely rely upon such an exception—at least not often enough to change the deterrence calculus. See *Murray*, 487 U. S., at 540 ("We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises . . ."); *Nix*, 467 U. S., at 445 ("A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered"); *id.*, at 444 ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received").

Segura's police officers would have been foolish to have entered the apartment unlawfully with the *ex ante* hope that an independent causal chain of events would later

occur and render admissible the evidence they found. By way of contrast, today's holding will seriously undermine deterrence in knock-and-announce cases. Officers will almost always know *ex ante* that they can ignore the knock-and-announce requirement without risking the suppression of evidence discovered after their unlawful entry. That fact is obvious, and this Court has never before today—not in *Segura* or any other post-*Weeks* (or post-*Mapp*) case—refused to apply the exclusionary rule where its absence would so clearly and so significantly impair government officials' incentive to comply with comparable Fourth Amendment requirements.

Neither does *New York* v. *Harris*, *supra*, support the Court's result. See *ante*, at 6, 14; but see *ante*, at 3 (opinion of KENNEDY, J.) (declining to join section relying on *Harris*). In *Harris*, police officers arrested the defendant at his home without a warrant, in violation of *Payton* v. *New York*, 445 U. S. 573 (1980). Harris made several incriminating statements: a confession in his home, a written inculpatory statement at the stationhouse, and a videotaped interview conducted by the district attorney at the stationhouse. 495 U. S., at 16. The trial court suppressed the statements given by Harris in the house and on the videotape, and the State did not challenge either of those rulings. *Ibid.* The sole question in the case was whether the written statement given later at the stationhouse should also have been suppressed. The Court held that this later, outside-the-home statement "was admissible because Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id.*, at 20. Immediately after the Court stated its holding, it explained:

"To put the matter another way, suppressing the

> statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the home *is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been;* the purpose of the rule has thereby been vindicated." *Ibid.* (emphasis added).

How can JUSTICE SCALIA maintain that the evidence here—a gun and drugs seized in the home—is "'not the fruit'" of the illegal entry? *Ante*, at 14. The officers' failure to knock and announce rendered the entire search unlawful, *Wilson*, 514 U. S., at 936, and that unlawful search led to the discovery of evidence in petitioner's home. Thus, *Harris* compels the opposite result than that reached by the Court today. Like the *Payton* rule at issue in *Harris*, the knock-and-announce rule reflects the "reverence of the law for the individual's right of privacy in his house." *Miller*, 357 U. S., at 313; cf. *Harris*, 495 U. S., at 17 ("*Payton* itself emphasized that our holding in that case stemmed from the 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic'"). Like the confession that was "excluded, as it should have been," in *Harris*, *id.*, at 20, the evidence in this case was seized in the home, immediately following the illegal entry. And like *Harris*, nothing in petitioner's argument would require the suppression of evidence obtained *outside* the home following a knock-and-announce violation should be suppressed, precisely because officers have a remaining incentive to follow the rule to avoid the suppression of any evidence obtained from the very place they are searching. Cf. *ibid.* ("Even though we decline to suppress statements made outside the home following a *Payton* violation, the principle incentive to obey *Payton* still obtains: the police know that a war-

rantless entry will lead to the suppression of any evidence found, or statements taken, inside the home").

I concede that *United States* v. *Ramirez*, 523 U. S. 65, offers the majority its last best hope. *Ante*, at 14–15. But not even that case can offer the majority significant support. The majority focuses on the Court's isolated statement that "destruction of property in the course of a search may violate the Fourth Amendment, *even though the entry itself is lawful and the fruits of the search are not subject to suppression*." *Ramirez*, *supra*, at 71 (emphasis added). But even if I accept this dictum, the entry here is unlawful, not lawful. *Wilson*, 514 U. S., at 931, 934. It is one thing to say (in an appropriate case) that destruction of property after proper entry has nothing to do with discovery of the evidence, and to refuse to suppress. It would be quite another thing to say that improper entry had nothing to do with discovery of the evidence in this case. Moreover, the deterrence analysis for the property destruction cases (where, by definition, there will almost always be quantifiable damages) might well differ.

IV

There is perhaps one additional argument implicit in the majority's approach. The majority says, for example, that the "cost" to a defendant of "entering this lottery," *i.e.*, of claiming a "knock-and-announce" violation, "would be small, but the jackpot enormous"—namely, a potential "get-out-of-jail-free card." *Ante*, at 8. It adds that the "social costs" of applying the exclusionary rule here are not worth the deterrence benefits. *Ante*, at 13. Leaving aside what I believe are invalid arguments based on precedent or the majority's own estimate that suppression is not necessary to deter constitutional violations, one is left with a simple unvarnished conclusion, namely, that in this kind of case, a knock-and-announce case, "[r]esort to the massive remedy of suppressing evidence of guilt is

unjustified." *Ibid.* Why is that judicial judgment, taken on its own, inappropriate? Could it not be argued that the knock-and-announce rule, a subsidiary Fourth Amendment rule, is simply not important enough to warrant a suppression remedy? Could the majority not simply claim that the suppression game is not worth the candle?

The answer, I believe, is "no." That "no" reflects history, a history that shows the knock-and-announce rule is important. See *Wilson*, *supra*, at 931–936. That "no" reflects precedent, precedent that shows there is no preexisting legal category of exceptions to the exclusionary rule into which the knock-and-announce cases might fit. See *supra*, at 8–9. That "no" reflects empirical fact, experience that provides confirmation of what common sense suggests: without suppression there is little to deter knock-and-announce violations. See *supra*, at 6–7.

There may be instances in the law where text or history or tradition leaves room for a judicial decision that rests upon little more than an unvarnished judicial instinct. But this is not one of them. Rather, our Fourth Amendment traditions place high value upon protecting privacy in the home. They emphasize the need to assure that its constitutional protections are effective, lest the Amendment 'sound the word of promise to the ear but break it to the hope.' They include an exclusionary principle, which since *Weeks* has formed the centerpiece of the criminal law's effort to ensure the practical reality of those promises. That is why the Court should assure itself that any departure from that principle is firmly grounded in logic, in history, in precedent, and in empirical fact. It has not done so. That is why, with respect, I dissent.

APPENDIX TO OPINION OF BREYER, J.

Fourth Amendment decisions from 1914 to present requiring suppression of evidence seized (or remanding for lower court to make suppression determination) in a private home following an illegal arrest or search:

1. *Weeks* v. *United States*, 232 U. S. 383 (1914) (warrantless search)
2. *Amos* v. *United States*, 255 U. S. 313 (1921) (warrantless arrest and search)
3. *Agnello* v. *United States*, 269 U. S. 20 (1925) (warrantless search)
4. *Byars* v. *United States*, 273 U. S. 28 (1927) (invalid warrant)
5. *United States* v. *Berkeness*, 275 U. S. 149 (1927) (invalid warrant; insufficient affidavit)
6. *Taylor* v. *United States*, 286 U. S. 1 (1932) (warrantless search)
7. *Grau* v. *United States*, 287 U. S. 124 (1932) (invalid warrant; insufficient affidavit)
8. *Nathanson* v. *United States*, 290 U. S. 41 (1933) (invalid warrant; insufficient affidavit)
9. *McDonald* v. *United States*, 335 U. S. 451 (1948) (warrantless arrest and search)
10. *Kremen* v. *United States*, 353 U. S. 346 (1957) *(per curiam)* (warrantless search)
11. *Elkins* v. *United States*, 364 U. S. 206 (1960) (search beyond scope of warrant)
12. *Silverman* v. *United States*, 365 U. S. 505 (1961) (warrantless use of electronic device)
13. *Chapman* v. *United States*, 365 U. S. 610 (1961) (warrantless search)
14. *Mapp* v. *Ohio*, 367 U. S. 643 (1961) (warrantless search)
15. *Wong Sun* v. *United States*, 371 U. S. 471 (1963) (warrantless search and arrest)

16. *Fahy* v. *Connecticut*, 375 U. S. 85 (1963) (warrantless search)
17. *Aguilar* v. *Texas*, 378 U. S. 108 (1964) (invalid warrant; insufficient affidavit)
18. *Stanford* v. *Texas*, 379 U. S. 476 (1965) (invalid warrant; particularity defect)
19. *James* v. *Louisiana*, 382 U. S. 36 (1965) *(per curiam)* (warrantless search)
20. *Riggan* v. *Virginia*, 384 U. S. 152 (1966) *(per curiam)* (invalid warrant; insufficient affidavit)
21. *Bumper* v. *North Carolina*, 391 U. S. 543 (1968) (lack of valid consent to search)
22. *Recznik* v. *City of Lorain*, 393 U. S. 166 (1968) *(per curiam)* (warrantless search)
23. *Chimel* v. *California*, 395 U. S. 752 (1969) (invalid search incident to arrest)
24. *Von Cleef* v. *New Jersey*, 395 U. S. 814 (1969) *(per curiam)* (invalid search incident to arrest)
25. *Shipley* v. *California*, 395 U. S. 818 (1969) *(per curiam)* (invalid search incident to arrest)
26. *Vale* v. *Louisiana*, 399 U. S. 30 (1970) (invalid search incident to arrest)
27. *Connally* v. *Georgia*, 429 U. S. 245 (1977) *(per curiam)* (invalid warrant; magistrate judge not neutral)
28. *Michigan* v. *Tyler*, 436 U. S. 499 (1978) (warrantless search)
29. *Mincey* v. *Arizona*, 437 U. S. 385 (1978) (warrantless search)
30. *Franks* v. *Delaware*, 438 U. S. 154 (1978) (invalid warrant; obtained through perjury)
31. *Payton* v. *New York*, 445 U. S. 573 (1980) (warrantless arrest)
32. *Steagald* v. *United States*, 451 U. S. 204 (1981) (warrantless search)
33. *Michigan* v. *Clifford*, 464 U. S. 287 (1984) (war-

rantless search)

34. *Welsh* v. *Wisconsin*, 466 U. S. 740 (1984) (warrantless entry into home without exigent circumstances)
35. *Thompson* v. *Louisiana*, 469 U. S. 17 (1984) *(per curiam)* (warrantless search)
36. *Arizona* v. *Hicks*, 480 U. S. 321 (1987) (unreasonable search)
37. *Minnesota* v. *Olson*, 495 U. S. 91 (1990) (warrantless entry into home)
38. *Flippo* v. *West Virginia*, 528 U. S. 11 (1999) *(per curiam)* (warrantless search)
39. *Kyllo* v. *United States*, 533 U. S. 27 (2001) (warrantless use of heat-imaging technology)
40. *Kirk* v. *Louisiana*, 536 U. S. 635 (2002) *(per curiam)* (warrantless arrest and search)
41. *Kaupp* v. *Texas*, 538 U. S. 626 (2003) *(per curiam)* (warrantless search)